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Supreme Court of the United States

TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

—v.—

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

Supreme Court of the United States

TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

—v.—

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Amended Petition of Otis Loper for the Writ of Habeas Corpus in the United States District Court	1
Respondent's Reply in the United States District Court	7
Excerpts from reporter's transcript of proceedings in the United States District Court	19
Excerpts from the direct testimony of Otis Loper	15
Excerpts from the testimony on direct examination of Respondent's witness L. D. Harris	17
Excerpts from the cross examination of Respondent's witness L. D. Harris	18
Petitioner's Exhibit No. 1 in the United States District Court —reporter's transcript of proceedings in the 1947 criminal trial, Cause No. 58,883	19

Page

Petitioner's Exhibit No. 8 in the United States District Court—Mississippi v. Loper, No. 1597 in Circuit Court of Leake County, Mississippi ____ 52

Petitioner's Exhibit No. 9 in the United States District Court—certified copies of indictment and judgment—State v. Loper, No. 65629 in the Criminal Court of Hamilton County, Tennessee ____ 53

Petitioner's Exhibit No. 10 in the United States District Court—copy of indictment and minutes of the County Court of Scott County, Mississippi, in State v. Fred Loper, Otis Loper and Louis Avery ____ 56

Findings of Fact and Conclusions of Law in the United States District Court ____ 59

Judgment of the United States District Court ____ 66

Opinion of the United States Court of Appeals for the Fifth Circuit, J. Gervin ____ 67

Judgment of the United States Court of Appeals for the Fifth Circuit ____ 84

Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing ____ 85

Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing pro se ____ 86

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari ____ 87

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

vs.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

AMENDED PETITION OF OTIS LOPER
FOR THE WRIT OF HABEAS CORPUS

TO SAID HONORABLE COURT:

Comes now OTIS LOPER, Petitioner in the above entitled and numbered cause, and with leave of Court files this his Amended Petition for the Writ of Habeas Corpus and would respectfully show:

1.

Petitioner is a citizen of the United States and a resident of Walker County, Texas.

2.

Petitioner is restrained of his liberty in violation of the Constitution and laws of the State of Texas and the United States in the custody of Dr. George J. Beto, Respondent, Director, Texas Department of Corrections. Petitioner is incarcerated at the Wynn Unit of the Texas Department of Corrections located in Huntsville, Walker County, Texas.

3.

The claim and authority by virtue of which Petitioner is restrained of his liberty is a judgment of the Criminal

District Court of Harris County, Texas, in Cause No. 58,883, styled "The State of Texas v. Otis Loper," rendered on November 20, 1947. The judgment of the Criminal District Court of Harris County, Texas, is void and without authority of law, and the imprisonment of Petitioner is a denial of the rights guaranteed him by the Constitution and laws of the State of Texas and the United States as hereinafter shown.

4.

At the time of his indictment and arrest for the felony offense of rape for which he was tried and convicted, Petitioner was indigent, and this fact was well known to the Court, and the District Attorney. Despite the State's knowledge of his indigency making it impossible for Petitioner to employ counsel to assist him in defending the charge against him, Petitioner was denied Court-appointed counsel to assist him in the investigation and preparation of his defense until the day of trial. In this regard, Petitioner would show that he was arrested on the charge of rape and held in the Harris County jail for a considerable period prior to trial, and that he was not informed that counsel had been appointed to represent him until November 17, 1947, the date of trial. Petitioner says that he was thereby denied an opportunity to consult with his attorney prior to trial and to obtain assistance of counsel in the investigation and preparation of his defense to the charge, all of which resulted in a denial of Petitioner's rights to a fair and impartial trial and to the effective assistance of counsel.

5.

Petitioner further says that he was denied the right to have an examining trial and to appear before the court and ask for an attorney, to request bond be set, and to examine the witnesses against him before grant jury action was taken.

6.

Petitioner was arrested on August 9, 1947. He was tried for the offense of rape, for which he is now in-

carcerated, on November 17, 1947. Between the aforementioned dates, Petitioner was at all times in custody in the Harris County jail. He was not arraigned prior to November 17, 1947 and no examining trial was held. Petitioner would show that on November 17, 1947, he was brought from the Harris County jail to the Courtroom of the Criminal District Court of Harris County, Texas, by an officer of the Court, and there for the first time was informed that counsel had been appointed to represent him. Immediately after informing Petitioner that counsel had been appointed to represent him, the Court called for announcement of the case, and the trial was begun immediately. Petitioner would further show that he was unlearned in the law and the processes thereof, and did not know of his right to time to prepare his defense. Moreover, he was wholly dependent upon the assistance of the attorney the Court had provided him. Petitioner would show that the totality of circumstances surrounding this "hurry up" procedure of arraignment, trial and conviction on the same day, coupled with the fact that he was not given an opportunity to consult with his court-appointed counsel prior to trial, and, being incarcerated and not versed in law, was not himself able to prepare for trial, resulted in a denial of a petitioner's right to a fair and impartial trial by jury and to the effective assistance of counsel.

7.

Petitioner would further show that during the trial of the case he was denied his constitutionally protected right to confront the witnesses against him and that the State of Texas suppressed evidence and witnesses, thereby denying his right to a fair and impartial trial. In this regard, Petitioner would show that, not having been afforded counsel prior to trial, he, finally and in desperation caused to be issued several witness subpoenas, and that the State had subpoenaed Petitioner's then wife, Willett Loper. The subpoena directed to Petitioner's wife was returned unserved, and when Petitioner, on trial of the case, called his wife as a witness she was not in at-

tendance. Petitioner requested the Court to continue the case until he had an opportunity to try and secure her attendance as a witness, but the Court refused such a continuance, and directed the trial to proceed. Petitioner believes that at the time his wife was living in Lufkin, Texas, and previous to the trial had written representatives of the State of Texas asking to be notified of the date of trial so she could be in attendance. Petitioner himself did not know the whereabouts of his wife, and could not himself inform her of the date and time of the trial. Petitioner would show that the State, knowing the whereabouts of the witness and knowing her materiality as a witness for the defense, failed to notify Petitioner of her whereabouts, allowed the subpoena to be returned unserved without relating to Petitioner or to the Court the whereabouts of the witness and her desire to be in attendance, and thereby actively or negligently suppressed evidence and testimony material to Petitioner's defense in violation of his constitutionally guaranteed right of a fair trial. Moreover, Petitioner alleges that the State had knoweldge of witnesses who would testify that the offense for which Petitioner was convicted was never in fact committed, and that knowledge of the existence of these witnesses was willfully or negligently suppressed from the Petitioner and the Court, denying Petitioner his right to a fair and impartial trial.

8.

Petitioner's trial on the offense of rape was held on November 17, 1947, and was begun and concluded on that date. In fact, Petitioner would show the Court that the whole trial took approximately 2 or 3 hours from the time jury selection began until the verdict was returned. Immediately after the verdict was returned, Petitioner's Court-appointed counsel left the courtroom and Petitioner never saw his Court-appointed counsel again. Sentence was passed on November 20, 1947, in the absence of counsel. Petitioner would show that this procedure resulted in his being deprived of representation by counsel at every critical stage of the proceedings.

9.

Petitioner would further show that he was deprived of the right to appeal and of counsel on appeal by the abandonment of his Court-appointed counsel as mentioned in the preceding paragraph, and the failure of the Court to afford him counsel to perfect his appeal. In this regard Petitioner would show that he brought home to the Court his desire to appeal by requesting from the Court a transcript of the trial, stating to the Court that he wanted to do something about his case. The Court thereupon referred him to the Clerk of the Court, but, because of his incarceration and his transfer to the State Prison in Huntsville, and because of the lack of assistance of a counsel, Petitioner was unable to perfect his appeal. Petitioner would show that he was thereby denied the right to appeal, equal protection of the law, and effective assistance of counsel.

10.

Petitioner would further show that he was denied equal protection of law and due process of law in connection with revocation of his parole. In this regard, Petitioner would show that he was paroled by the State Board of Pardons and Parole on November 15, 1962 and obtained permission to and did move to Mississippi. While in Carthedge, Mississippi, on February 11, 1963, he was arrested on a charge of car theft which was later dismissed. When he attempted to secure his release from jail in Mississippi, on the car theft charge, he was informed by the parole officer to whom he had been assigned in Mississippi that the Texas authorities had revoked his parole. Petitioner would show that he was not afforded notice that revocation of his parole was being considered by the Texas authorities. Petitioner was denied a hearing before the Texas Board of Pardons and Paroles as was required by Section 20 of Article 7081d of the Texas Code of Criminal Procedure of 1948, then in effect. Nor was he afforded counsel to represent him at the revocation of parole proceedings. Petitioner was returned to the Texas

Department of Corrections and incarcerated and such incarceration has continued to the present time.

11.

Petitioner took the stand in his own defense at his trial, and the State was allowed to introduce evidence of, and question him concerning, prior convictions in an attempt to discredit his testimony. Petitioner would show the Court that the convictions used for impeachment were void for the reason that Petitioner was deprived of the right to representation by counsel on the trials resulting in such prior convictions. The prior convictions were, therefore, unavailable for impeachment or any other purpose, and their use by the State deprived plaintiff of fair and impartial trial by jury.

12.

Petitioner has applied to the District Court of Harris County, Texas and the Court of Criminal Appeals of Texas for the writ of habeas corpus on the same grounds included herein, but said applications were without hearing denied by the 176th District Court, Honorable Wendall A. Odom, Judge, on the 17th day of October, 1968, and by the Court of Criminal Appeals of Texas on the 25th day of April, 1969.

WHEREFORE, Petitioner prays that a writ of habeas corpus issue directed to Dr. George J. Beto, Director, Texas Department of Corrections, by whom Petitioner is detained, for the purpose of inquiring into the cause of imprisonment and restraint, that Petitioner be afforded a full plenary hearing hereon and that upon final hearing hereof Petitioner be discharged from the legal confinement.

Dan G. Matthews
800 Bank of the Southwest Bldg.
Houston, Texas 77002
CA 4-7070
Attorney for Petitioner

[Affidavit Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

RESPONDENT'S ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Dr. George J. Beto, Respondent in the above entitled and numbered cause, and respectfully makes his answer as follows:

I.

Respondent denies each and every allegation of fact made by petitioner except those facts supported by the Record and those facts specifically admitted by the Respondent.

II.

Respondent is the Director of the Texas Department of Corrections and holds legal custody of Petitioner by virtue of a valid judgment and sentence in Cause No. 58,883 from the Criminal District Court of Harris County, Texas styled *The State of Texas* v. *Otis Loper*.

The Grand Jury of Harris County, Texas, returned an indictment against Petitioner on September 17, 1947 charging him with the capital offense of rape. On August 9, 1947, Petitioner had obtained unlawful carnal knowledge of the 8 year old daughter of a woman with whom he had been living.

Petitioner retained two attorneys to represent him on this charge. One of the attorneys was the Honorable James Letts, now deceased, who at the time he was retained by Petitioner, had specialized in the defense of criminal cases for over 30 years. The other attorney was Mr. J. D. Harris who was also experienced in the trial of criminal cases.

On November 4, 1947, Mr. Letts was present in the office of the Sheriff of Harris County where, as counsel for Petitioner, he approved the list of 125 special veniremen who had been chosen for Petitioner's case. A copy of the same list was also served on Petitioner at a later date.

Petitioner's case came on for trial on November 17, 1947 with the retained counsel present in his behalf. Petitioner had, without the knowledge of his counsel, caused subpoenas to be issued for several persons, including two doctors. The prosecution had issued subpoenas for several persons including the mother of the victim. All the subpoenas of both parties had been served except for the subpoena on Willette Loper, the victim's mother. The subpoena for Willette Loper had been returned unserved with the notation that Willette Loper had moved from the address on the subpoena and that her whereabouts were unknown. These facts were made known to all the parties before they announced ready for trial. The prosecution did not attempt to call Willette Loper because she probably was the common law wife of Petitioner and, under Texas law, she could not be used as a witness against her husband. During the trial, the Defense attorneys saw Willette Loper in the Courthouse and concluded that she had consumed too much alcoholic beverages to be useful as a witness for the defense.

Petitioner was duly arraigned by having the indictment read to him and by entering a plea of not guilty. After the jury was selected, Petitioner again entered a plea of not guilty and the evidence was then presented to the jury. On the same day, November 17, 1947, the jury returned its verdict finding Petitioner guilty as charged in the indictment. Petitioner and his counsel were both relieved that the jury did not assess the death penalty.

During the trial, Petitioner and counsel discussed the advisability of calling the two doctors as witnesses. Counsel informed Petitioner that counsel understood that Petitioner had seriously injured the victim and that counsel felt the doctors should not be called because if they so testified, it would seriously harm the defense. Since Petitioner had no idea what information would be gained from the doctors, it was decided not to take a chance on their testimony.

Counsel for Petitioner filed a Motion for New Trial which was overruled by the trial court on November 20, 1947. The Motion was not seriously urged because of counsel's feeling that if it were granted, the second trial

would be conducted by the Criminal District Attorney personally and would in all probability result in the assessment of the death penalty.

After the overruling of the Motion for New Trial, Petitioner was formally sentenced to confinement in the State penitentiary for not less than five nor more than fifty years. No Notice of Appeal was given because it was not the intent of the Petitioner or his counsel to appeal the conviction. Since no appeal was perfected, there is no record of the testimony presented at the Petitioner's trial.

III.

Petitioner is a veteran applicant for the writ of habeas corpus who has filed numerous applications in State District Courts, the Court of Criminal Appeals, and at least two United States District Courts. Two State District Courts have held evidentiary hearings on Petitioner's applications. The first hearing was conducted in Cause No. 10,048 in the District Court of Houston County, Texas on December 15, 1948. Petitioner was present in person and a full hearing was held with Petitioner being assisted by Mr. J. B. Sallas an attorney from Crockett, Texas. The grounds for relief urged by Petitioner were:

(1) That he was denied the right to have a medical examination of the victim made by doctors Robert Moers and Arthur Moers.

(2) That he was indicted for one offense and tried for another.

(3) That there was not substantial evidence to support the conviction.

At the conclusion of the hearing, the Court filed Findings of Fact adverse to Petitioner's claims but granted Petitioner leave to obtain a record on appeal without payment of costs.

After considering the Findings of the trial judge, the Court of Criminal Appeals denied the application on March 9, 1947. On April 20, 1949, Petitioner's Motion for Rehearing was denied. The Court's opinion is attached to this Answer and is reported as *Ex Parte Loper*, 219 S.W.2d 81 (Tex. Crim. App. 1949).

The second evidentiary hearing in the State trial court was conducted in Cause No. 61,536 in the Criminal District Court of Harris County, Texas, on July 15, 1949.

Petitioner prepared an application for habeas corpus on June 18, 1949 which he sent to the Honorable Ben W. Boyd, Judge of the 16th Judicial District Court of Denton County, Texas. Judge Boyd issued the writ and made it returnable before the Honorable Frank Williford, Judge of the Criminal District Court of Harris County, Texas. The effect of Judge Boyd's order was to cause a full hearing on Petitioner's application to be held before Judge Williford on July 14, 1949, in Cause No. 61,536 of the Criminal District Court of Harris County. Petitioner was present in person at the hearing and a number of witnesses, including Mr. Letts, Peitioner's former attorney testified. The grounds for relief urged by Petitioner were:

(1) That he was denied the right to have a preliminary hearing and to cross-examine the witnesses against him.

(2) That he was deprived the right to be confronted by the witnesses against him and to cross-examine them.

(3) That he was indicted for statutory rape and convicted of rape.

After hearing all the evidence, Judge Williford found:

(1) That Petitioner had been ably defended by Mr. Letts and Mr. Harris.

(2) That Mr. Letts had practiced criminal law principally for more than 30 years at the bar of the Court.

(3) That Mr. Harris was also experienced in criminal matters.

(4) That Petitioner had received a fair trial.

(5) That there was substantial evidence of Petitioner's guilt.

(6) That Petitioner was trying to use the Writ of Habeas Corpus as a substitute for appeal.

(7) That there was no merit to any of Petitioner's other claims.

Judge Williford, pursuant to Texas practice, certified the record and his Findings to the Court of Criminal Appeals of Texas. The Court ordered a Statement of Facts forwarded without costs to Petitioner who claimed to be a pauper. The Court of Criminal Appeals denied the application on October 12, 1949 in an opinion styled *Ex Parte Loper*, 223 S.W.2d 523 (Tex. Crim. App. 1949).

Copies of all records in the two State evidentiary hearings are attached hereto and expressly made a part hereof for all purposes.

IV.

On November 30, 1949, Petitioner escaped from Respondent's custody and remained on escape until January 20, 1951. He did not file any applications for habeas corpus during this period of time.

V.

Petitioner has showered the Court of Criminal Appeals of Texas with applications for the writ of habeas corpus which have all been denied and assigned to application file No. 59 of said court. In addition to the foregoing, Petitioner has applied for the writ of certiorari from the Supreme Court of the United States on at least three occasions and all have been denied.

VI.

Petitioner has filed at least six applications for writ of habeas corpus in the United States District Court for the Southern District. The six applications which have been given cause numbers are: (1) CA. 4563; (2) CA. 8469; (3) CA. 12,133; (4) CA. 12,226; (5) CA. 66-H-657 (present case); and (6) CA. 67-H-207.

No records are now available in Civil Action No. 4563.

In Civil Action No. 8469, Petitioner's application for writ of habeas corpus was denied by the Honorable T. M. Kennerly, United States District Judge. Upon appeal, the Court of Appeals reversed and remanded the case to the trial court for proceedings not inconsistent with its

opinion therein. The Court of Appeal's opinion is reported in *Loper* v. *Ellis*, 224 F.2d 901 (5th Cir. 1955). Upon remand the District Court dismissed the petition with prejudice on January 3, 1956 because Petitioner had failed to comply with the decision of the Court of Appeals. No further action was taken by Petitioner in Cause No. 8469. The Opinion and other records in Cause No. 8469 are attached hereto and made expressly a part hereof.

The petition in Civil Action No. 12,133 was filed on September 16, 1957. The application was denied by the Honorable Joe Ingraham, United States District Judge, on September 21, 1957. The Statement of Facts in Cause No. 58,883 in the Criminal District Court of Harris County, Texas, styled *The State of Texas* v. *Otis Loper* was attached as part of Respondent's Answer. It was, however, on August 6, 1959, released to Petitioner who has failed to return such Statement of Facts to this Honorable Court.

Civil Action No. 12,226 was begun in the Southern District of Texas on July 21, 1958 after having been transferred from the Eastern District of Texas where it had been given Civil Action No. 2526. After an evidentiary hearing on September 2, 1958, the petition was denied and the formal Order of Dismissal was entered on September 10, 1958. The Court of Appeals affirmed the judgment of the District Court in *Loper* v. *Ellis*, 263 F.2d 211 (5th Cir. 1959).

The petition filed in Civil Action No. 66-H-657 is, of course, the petition presently pending before the Court upon remand of the Fifth Circuit's opinion in *Loper* v. *Beto*, —— F.2d ——, decided October 6, 1967.

Civil Action No. 67-H-207 was filed on March 17, 1967 before the Honorable Allen B. Hannay, United States District Judge. The petition was denied on October 17, 1967 after Judge Hannay had found that the Petitioner had not exhausted his available State remedy under Article 11.07 of the Texas Code of Criminal Procedure. The record reveals that Petitioner had, in fact, exhausted all the remedies available to him in the State courts on all issues but the ones concerning the revocation of his parole.

VII.

Petitioner has filed at least six applications for writ of habeas corpus in the United States District Court for the Eastern District of Texas. These six petitions are: (1) Civil Action No. 2236; (2) Civil Action No. 2526 (Transferred to the Southern Distict); (3) Civil Action No. 2596; (4) Civil Action No. 2641; (5) Civil Action No. 2703; and (6) Civil Action No. 4458.

While no opinions or records in Civil Action Nos. 2596 and 2703 are attached to this Answer, they are considered in the other opinions rendered by the Judge of the Eastern District of Texas, the late Honorable Joe Sheehy as having been without merit and the Court took judicial notice of each of the prior proceedings in Civil Action No. 4458. The Opinions in Cause Nos. 2236, 2526, 2641 and 4458 are attached hereto and expressly made a part hereof for all purposes. Also attached to this Answer are the depositions of witnesses in Civil Action No. 2641 and the deposition of Petitioner in Civil Action No. 4458.

An examination of the opinions rendered by Judge Sheehy shows that all allegations with the exception of that concerning revocation of parole have been previously developed and have been determined to be without merit.

VIII.

Petitioner's applications for the writ of habeas corpus have time and time again been held to be without merit after a full and adequate development of the facts and evidentiary hearings conducted by both the State and Federal courts. Successive, repetitious, meritless applications need not be entertained by the Court under the authority of 28 U.S.C. Section 2244.

IX.

Petitioner has exhausted the remedies available to him in the courts of the State of Texas on all contentions except those concerning the revocation of his parole.

X.

Parole and the conditions and revocation thereof are matters of executive clemency to be determined by the Governor of the State of Texas and the Texas Board of Pardons and Paroles. No constitutional or other federally protected right of Petitioner has been violated by the revocation of his parole and no federal question is presented to this Court for determination.

XI.

Petitioner has been accorded each and every right and privilege guaranteed to him by the Constitution of the United States and by the Constitution and laws of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that Petitioner's application for writ of habeas corpus be, in all things, denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Executive Assistant Attorney General

R. L. LATTIMORE
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

/s/ Thomas F. Keever
THOMAS F. KEEVER
Assistant Attorney General

[Certificate Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Title Omitted in Printing]

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT TESTIMONY OF OTIS LOPER, p. 38]

* * * * *

[fol. 38] Q All right, sir. Now, the statement of facts of the trial, Mr. Loper, reveal that the state was allowed to cross-examine you concerning certain prior convictions, [fol. 39] and I would like to ask you a few questions about those, if I may.

A Yes, sir.

Q Were you convicted in 1931 of burglary in Scott County, Mississippi?

A Yes, sir.

Q How old were you at this time?

A I don't remember, but I believe I was around 17 years, something around that age. I'm not for sure.

Q Were you represented by an attorney in connection with that proceedings?

A No, sir, I didn't have an attorney.

Q Were you advised that you had a right to an attorney whether you could afford one or not?

A No, sir.

Q Did you know that you were entitled to one whether you could afford one or not?

A No, sir.

Q Did you inform the court that you did not want to be represented by an attorney?

A No, sir.

Q Were you convicted in that proceeding?

A Yes, sir.

Q Were you convicted, Mr. Loper, of burglary in 1940 in Leake County, Mississippi?

[fol. 40] A Yes, sir.

Q How old were you at the time that occurred?

A I believe I was about 25 or 26, I don't remember for sure.

Q Let me ask you one more question about that Scott County, Mississippi, conviction. Did you plead guilty or not guilty?

A I plead guilty.

Q Were you sentenced to a term in prison?

A Yes, sir.

Q All right, sir. Now, in connection with the 1940 conviction, were you represented by an attorney?

A No, sir.

Q At any stage of the proceedings?

A No, sir.

Q Were you advised that you had a right to an attorney whether you could afford one or not?

A No, sir.

Q Could you in fact afford one?

A I don't believe I could have then.

Q What about 1931, the conviction in Scott County, Mississippi, could you have afforded an attorney?

A I couldn't have, no, sir.

Q Did you know in connection with the 1940 proceeding that you were entitled to be represented by counsel whether you could afford it or not?

[fol. 41] A No, sir.

Q Did you inform the court that you did not want to be represented by an attorney?

A No, sir.

Q Was the 1940 proceeding in Leake County, Mississippi, did you plead guilty or not guilty?

A Not guilty.

Q Was a trial held?

A Yes, sir.

Q Who conducted the defense in that trial?

A Well, there wasn't anybody. I just didn't know what to ask the people. I didn't know anything about how to.

Q Did you conduct your own trial?

A As far as it was conducted, yes, sir.

Q Why did you attempt to do so yourself?

A Well, I didn't have an attorney, and nobody to help me. I didn't want to plead guilty to it.

* * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT EXAMINATION OF RESPONDENT'S WITNESS L. D. HARRIS, p. 97]

* * * * *

[fol. 97] A Yes. I appeared in the trial of the case, and the District Attorney offered Mr. Loper ten years on a plea of guilty. He refused to plead guilty, over Jim Letts' recommendation. And then during the trial, I objected to several things, and especially the testimony in regard to details referring to Mr. Loper's past record. I asked the Judge to approach the bench, and we—Mr. Letts and I and the District Attorney, Assistant District Attorney and the Judge, had a conversation. And I told him that there wasn't a certified copy of the judgments [fol. 98] in, that had been introduced in the record. I didn't see any judgments, and that the law, in my opinion, gives the District Attorney the right to ask the defendant if he had been convicted in this state or any other state in the last ten years for a felony—

THE COURT: Or a misdemeanor involving moral turpitude?

A (Continuing)—or a misdemeanor involving moral turpitude.

THE COURT: And he is supposed to answer yes or not.

A (Continuing) And if he answered that question in the affirmative, that that is as far as the District Attorney or any other attorney asking that question could go. And Judge Williford overruled me, "I know what is good evidence and what is not, so we will just go ahead." And then, when the case was at a—

THE COURT: Now finish, Mr. Harris, what happened after that? The District Attorney asked Loper—

A He asked Mr. Loper about each and every conviction in detail. Burglary in 1953, we will say, and you were convicted of a robbery or something else on another [fol. 99] date, and the only time that I know of that he could have asked those questions is if Mr. Loper had denied that he had ever been convicted. But he didn't deny it. He said that he had been convicted of crimes.

THE COURT: So your real complaint insofar as the

point of law is concerned, was that, if I understand you after Loper admitted that he had been convicted of whatever it was, a felony, he, the Judge, the trial Judge, permitted the District Attorney to go into what they were for and what date and that sort of thing?

A Yes, sir.

THE COURT: I see. I understand.

Thank you. You go ahead.

* * * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—DIRECT TESTIMONY OF RESPONDENT'S WITNESS L. D. HARRIS, p. 111]

* * * * *

[fol. 111] Q What kind of trial attorney, or do you know, was Mr. Letts?

A Well, you have classifications with perhaps Percy Foreman at the top, and in my opinion, Jim Letts was a better attorney than Percy Foreman, as far as trial work is concerned. He had the ability to turn on what we call crocodile tears, and he could cry a verdict out of a jury better than anybody I have ever seen. And he was a good attorney as far as—

THE COURT: He was certainly an experienced lawyer and tried a great many cases in the Harris County Courthouse?

* * * * *

[REPORTER'S TRANSCRIPT OF PROCEEDINGS—CROSS EXAMINATION OF RESPONDENT'S WITNESS L. D. HARRIS—page 118]

* * * * *

[fol. 118] Q Do you recall Mr. Letts at the trial say that Betty Fay Darti was the only witness for the state placing the defendant as being the one who committed the offense?

A Yes, sir, and I thought it was very flimsy evidence.

* * * * *

Cause No. 58,883

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS
NOVEMBER TERM, A. D. 1947

THE STATE OF TEXAS

vs.

OTIS LOPER

STATEMENT OF FACTS

Philip B. Smith
Court Reporter
Criminal District Court
Harris County, Texas

GENERAL INDEX

Names of Witnesses	Examination	Page
Betty Fay Darty	Direct	22
	Cross	27
Dr. F. B. Weller	Direct	35
	Cross	37
Mr. Otis Milton Loper, DEFENDANT	Direct	39
	Cross	44
	Re-Direct	49
	Re-Cross	50
	Re-Direct	51
	DEFENDANT RESTS	51
	STATE RESTS	51
	COURT REPORTER'S CERTIFICATE	51

Cause No. 58,888

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS
NOVEMBER TERM, A. D. 1947

THE STATE OF TEXAS

vs.

OTIS LOPER

BE IT REMEMBERED, that upon this the 17th day of November, A. D. 1947, the above numbered and entitled cause coming on for trial, upon regular call of the docket, before the HON. FRANK WILLIFORD, JR., JUDGE OF SAID COURT, and all parties having appeared in person, and by their respective counsel, and having announced ready for trial, the following evidence was adduced and facts proven, to-wit:

APPEARANCES

FOR THE STATE:

Mr. E. B. Duggan
and
Mr. J. H. Meyers,
Assistant Criminal District Attorneys.

FOR DEFENDANT:

Mr. J. H. Letts
and
Mr. L. D. Harris,
Houston, Texas.

[fol. 2]

BETTY FAY DARTY,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Duggan

Q Your name is Betty Fay Darty?
A Yes sir.
Q How old are you, Betty Fay?
A I am eight years old.
Q Do you go to school?
A Yes sir.
Q What grade are you in?
A I am in the 3rd grade.
Q Do you go to Sunday school?
A Yes sir.
Q Do you know the difference between telling the truth and telling a story, or an untruth?
A Yes, I do.
Q What happens to you when you tell a story?
A I would go to the devil.
Q Now, how old did you say you were, Betty Fay?
A Eight.
Q And do you know Otis Loper, the Defendant there, seated at the counsel table?
[fol. 3] A Yes, I know him.
Q And what relation is the Defendant, Otis Loper, to you?
A What do you mean?
Q Is he your father or your stepfather?
A He is my step-father.
Q How long has he been your stepfather that you know about, the best you can remember?
A I don't remember.
Q What place or State did you come from when you came here to live in Houston?
A Sumiton, Alabama.
Q And you came over here to be with your mother?
A Yes sir.

MR. LETTS: Your honor, we object to counsel leading the witness.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's Bill of Exception No. 1)

Q When you came here to Houston to live with your mother, did you see this defendant, Otis Loper?

A Yes sir.

Q Had you ever seen him before that time?

A Yes, when he and my mother came out there to visit my grandmother.

[fol. 4] Q Your mother and this defendant, Otis Loper, came to Alabama to visit your grandmother and with whom you were staying with there in Alabama?

A Yes sir.

Q And then later you came to Houston to live with your mother here?

A Yes sir.

MR. LETTS: We object, your honor, as that is leading and suggestive and repetitious.

THE COURT: Yes, don't repeat, please.

Q Betty Fay, do you recall the date of August 9th, 1947, on or about that date, soon after you came to Houston here?

A I don't know exactly when I came out here, but I think that time was about when I came out here.

Q You were living here in Houston on or about that date?

A Yes sir.

Q Did something bad happen to you, Betty Fay, at that time?

A Yes sir.

Q And that was on or about the 9th day of August, 1947?

A Yes, I think so.

Q What day of the week was that, if you know, or remember, Betty Fay?

A That was a Saturday.

Q Where were you on that Saturday?

[fol. 5] A At home.

Q Who was there with you at home at that time?.

A My step-father, Otis Loper, and my little brother.

Q How old is your little brother?

A I guess he was about six or eight months old.

Q He was just a baby?

A Yes sir.

Q Where was your mother at that time?

A She and Mrs. Baker, a neighbor, had gone out—they went to the grocery store.

Q If you recall, Betty Fay, about what time was that on that Saturday morning did your mother and Mrs. Baker go to the grocery store?

A It was between eleven o'clock and something.

Q It was on the morning of that Saturday morning after eleven o'clock?

A Yes, it was in the morning.

Q And she left you there at home with this defendant, Otis Loper, and your little baby brother?

A Yes sir.

Q At that time what, if anything, did this defendant, your step-father, do to you?

A He stuck his finger up me.

Q He stuck his finger up you, what do you mean by up you, do you know what I mean when I say your private parts?

A Yes sir.

Q Did he stick his finger up in your private parts?

A Yes sir.

Q What did you do when he did that?

A I screamed.

Q And when you screamed, what did this defendant, Otis Loper, do?

A He stuck his nasty thing up me.

Q Do you know what I mean when I talk about this defendant's private parts?

A Yes sir.

Q Did he put his private parts in your private parts, Betty Fay?

A Yes, he did.

Q Did he hurt you when he did that, Betty Fay?

A Yes sir.

Q What did you do when this defendant, Otis Loper, put his private parts up in your private parts, Betty Fay?

A He hurt me.

Q What did you do?

A I screamed.

Q And did he finally get off of you?

A Yes. I kept screaming until he finally got off of me.

Q How long did the defendant have his private parts in your private parts?

MR. LETTS: We object to that question, your honor, as it is highly prejudicial and inflammatory to the jury.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 2)

A I don't know.

Q Where, in what room in the house, did the defendant put his private parts in your private parts?

A In the bedroom.

Q Where was it in the bedroom, was it on the floor or on the bed?

A On the bed.

Q Did you bleed from your private parts during or after he had his private parts in your private parts?

A Yes sir.

Q Did you bleed very much?

A Yes, I did.

Q Later, after this was over, Betty Fay, where did you go, if any place?

A I didn't go no where, but he went outdoors in the yard. I went outside in the yard later.

[fol. 8] Q Why did you go out in the yard—where was the bathroom there, Betty Fay, in the yard or in the house?

A It was in the backyard.

Q And when you went outside in the yard, did you go to the bathroom?

A Yes sir.

Q Later on during that day did you go anywhere; did you leave the house?

A I went to the hospital.

Q What hospital did you go to?

A I went to the Jeff Davis Hospital.

Q And did some doctor examine you there at the Jefferson Davis Hospital?

A Yes, he checked me.

Q Where did he check you, on what part of your body; did he check you where you were hurt?

A Yes sir.

MR. LETTS: Your honor, that is leading and suggestive, and we object to it if the Court, please.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 8)

Q How long did you stay in the hospital?

A Just a little while.

[fol. 9] Q Then where did you go, Betty Fay?

A I came over here.

Q You came over here to the Sheriff's Office that is located in this building?

A Yes sir.

Q And after you left the Sheriff's Office where did you go, Betty Fay?

A I went home.

Q And where is your home located?

A 801 Whitney Drive, Houston.

Q And where are you living now?

A I don't know—my mother, she moved away from there.

Q You have been staying out at the Mary Burnett School for Girls here in Houston?

A Yes sir.

Q When was the last time you saw your mother?

A The Sunday they let her out of jail.

Q That was the last time you have seen her?

A Yes, and since my little brother died, too.

Q Do you know where your mother is now?

A No sir.

Q You are not the wife of this defendant, Otis Loper, are you, Betty Fay?

A No, I am not.

[fol. 10] Q And this, what you have just told us, happened here in Houston, Harris County, Texas?

A Yes, in Houston here.

Q And it happened where you were living with your mother out on Whitney Drive, which is here in Houston, Harris County, Texas?

A Yes sir.

MR. DUGGAN: That's all the questions I have, your honor.

CROSS EXAMINATION

Questions by Mr. Letts.

Q You are Betty Fay Darty?

A Yes.

Q What is your mother's first name, Betty Fay?

A Willette.

Q Where was she born, if you know?

A I don't know.

Q Where were you born?

A I guess I was born in Carman Hill.

Q Where is that, in Mississippi or Alabama?

A Alabama.

Q How old are you, Betty Fay?

A Eight years old.

[fol. 11] Q When were you 8 years old?

A I was 8 on January 26th.

Q How long did you live in Alabama with your uncle and aunt?

A I lived with my grandmother and grandfather.

Q How long did you live with them?

A I guess about three or four years.

Q Who did you live with after you lived with your grandparents?

A My mother and stepfather.

Q What stepfather, the defendant here, Otis Loper?

A Yes sir.

Q. Did you ever live with a man by the name of Willis?

A Yes sir.

Q Your mother and you lived with him?

A Yes sir. He is dead now.

Q How long did you live with them?

A As much as I lived with my grandmother. He, Mr. Willis, lived with my grandmother and I lived there with them when I was a baby.

Q You were hurt in Alabama, weren't you?

A Yes, I guess I was.

Q Did you fall on something and hurt yourself while you were in Alabama?

A No, I didn't fall on anything but I was afraid my [fol. 12] mother would spank me if I told her the truth.

Q What did you tell her?

A I told her I fell on a stick of wood.

Q Tell us what did happen—why didn't you tell your mother?

A I didn't tell them because I was afraid of my stepfather and my mother.

Q And what stepfather was that, Mr. Willis?

A No, Otis Loper.

Q And what did he do then, if anything?

A He didn't do anything to me after I told my mother I fell on a stick of wood, and I also told my grandmother.

Q Why did you tell your grandparents you fell on a stick of wood?

A Because I was afraid of my mother and my stepfather. I was afraid my mother would spank me.

Q What did he do to you?

A He stuck his finger up me and put his nasty old thing in me.

Q How old were you then?

A I was 8 years old the last time he did it.

Q The last time he did it you were 8 years old?

A Yes.

Q And at the time were you living with your father that is dead now?

A No, when he did it then he wasn't there; he was dead.

[fol. 13] Q What was your grandfather's name?
A I don't know. He never told me what his name was.
Q How long did you live with your grandmother and your grandfather?
A About 3 or 4 years.
Q And where have you been since the time this first assault took place; have you been living here in Houston?
A The first time was in Alabama when I was living with my grandparents and the second one was here in Houston when I was living with my mother and Otis Loper, and I am living at the Mary Burnett School now.
Q Have you talked to anyone about this case?
A I have talked to them here.
Q Did you tell anyone in the Probation Department about this case?
A Yes. I told the lady that brought me out here.
Q What did she tell you to say?
A She told me to tell the truth.
Q To tell the truth, that is what she told you?
A Yes sir.
Q Didn't she tell you anything else?
A No sir.
Q She just told you only to tell the truth about it?
A Yes sir.
[fol. 14] Q Didn't she say anything else?
A She asked me some questions about it like the ones asked me here.
Q And you told her all about it?
A Yes sir.
Q What was the doctor's name that examined you at the Jeff Davis Hospital?
A I don't know.
Q You haven't seen him here today?
A No sir.
Q Now, tell this Jury and turn around and face them so they can get your facial expression and answer this question, didn't they tell you to tell here in court that your stepfather put his nasty thing in you?
A No sir.

Q They didn't tell you to take this witness stand and say that to the Jury?

A No. They told me to tell the truth.

Q They didn't tell you to say your stepfather put his nasty thing in you?

A No, they didn't.

MR. DUGGAN: Your honor, she has answered that two or three times; she said they told her to tell the truth.

[fol. 15] THE COURT: Yes, that's right, but this is cross-examination.

MR. DUGGAN: Yes, your honor.

Q Who told you this happened on August 9th?

A I guess this lady did that other time when I came down here. I don't know her name, and I didn't know it was on August 9th.

Q About four or five days before this defendant, your stepfather, was arrested did your mother have any trouble with your step-father?

MR. DUGGAN: I object to that question, your honor, unless counsel can show what connection that has with this case.

MR. LETTS: I will show that later, your honor.

THE COURT: I am not going to permit you to do it. Objection sustained.

MR. LETTS: Note our exception.

THE COURT: Yes sir.

(The above is defendant's bill of exception No. 4)

Q On August 9th, your mother, stepfather and little brother were at home there along with you?

A My mother and Mrs. Baker had gone to the store. They weren't there. My stepfather was there with me and my little brother.

[fol. 16] Q On August 9th around 8:30 or 9:00 A.M. your stepfather and mother and Mrs. Baker were at home there, isn't that right?

A Not my father. He went to town. No, he went to town later.

Q And Mrs. Baker and your mother went to the store for groceries?

A Yes sir.

Q And they were gone about an hour?
A Yes sir.
Q And when they came back your stepfather, you and the little baby brother were at home?
A Yes sir.
Q I ask you whether or not you left the house and ran up the drive-way to meet your mother when she was coming in and you asked her whether or not she brought you some candy and ice-cream, did you do that?
A No, because she didn't have enough money to buy ice cream and candy; she just bought groceries.
Q And you helped your stepfather and your mother bring the stuff in the house?
A Yes sir.
Q You wasn't crying then, were you?
A No sir.
Q You were out in the yard playing when your mother came home, weren't you?
[fol. 17] A Yes, I was out in the yard when my mother came home.
Q And your stepfather walked out with you and assisted you and your mother with the groceries?
A Yes sir.
Q You never told your mother anything about it at that time, did you?
A No, I didn't say anything about what my stepfather did to me until my mother said she was going to call the law and I knew they wouldn't hurt me.
Q What did you tell your mother and Mrs. Baker when they first drove up?
A I didn't tell her nothing. I was hurting and I went to the bathroom and she asked me why I was going to the bathroom so much and I told my mother I was hurting and where I was hurting.
Q At that time you were not crying?
A No, sir.
Q You helped your stepfather take the groceries in the house and after you, your mother and stepfather got in the house did your mother and stepfather get into an argument?
A No, sir, my step-father went to town.

Q Your stepfather went to town in the afternoon?

A Yes, sir, after he got the stuff in the house he went to town.

[fol. 18] Q What did your mother do later on that afternoon?

A She was still in the courthouse here.

Q And you were at home?

A No, me and my mother came over here from the hospital; she brought me over here.

Q And nothing was said between your mother and stepfather while Mrs. Baker was there after the groceries were taken in the house?

A No. Only my mother gave me some peaches.

Q How long was it after your stepfather was gone to town that you and your mother left the house?

A When she found out she told me to get ready to go.

Q After she found out what?

A That I was bleeding. She told Mrs. Baker to take care of the baby while me and her came down to the hospital.

Q When you went to the hospital with your mother did a doctor over there examine you?

A Yes sir.

Q And didn't he tell you there in the presence of your mother that nothing was the matter with you?

A He told my mother there was a split.

Q That what was split?

A Whatever you call it; I don't know.

Q Then you and your mother got in an automobile [fol. 19] and went where?

A You see we went to the hospital first and then we came here. After my mother found out about where I was hurting we went to the hospital and then we came over here.

Q You came from the hospital directly over here?

A Yes, sir. After she found out we went to the hospital and then came here to this building.

Q Your mother and you then went home with some officers?

A Yes sir.

Q That was how late in the afternoon?
A About four.
Q Four o'clock in the afternoon?
A Yes sir.
Q Your father was on his way home then?
A Yes, I guess so.
Q And it was about four blocks away from your home where he was arrested?
A Yes sir.
Q You and your mother got out of the car and walked home?
A Yes sir.
Q That was on Saturday afternoon around five o'clock?
A Yes sir.
Q On Sunday, the following day, what did you do?
A I don't know. I have forgotten now. I told my mother to get me some ice cream, and I asked my mother to take me to Sunday School. My mother said she couldn't get me any ice cream because she didn't have any money. I could hear them singing at the church and I asked my mother to take me to Sunday School and she said she didn't have any money.
Q On Monday, did you not go to where your father worked, you and your mother?
A I hadn't got to see my father since he was put in jail.
Q Just you and your mother went down on Commerce Street, didn't you?
A Yes sir.
Q What did you go down there for?
A They took me and my mother. They put me in the Mary Burnett School for Girls and they put my mother in jail.
Q They put your mother in jail that Monday?
A Yes sir. Mrs. Baker and my mother had a fight. My mother beat Mrs. Baker up.
Q Do you know a girl by the name of Beatrice Mae McGee?
A Mr. and Mrs. McGee?
Q Yes?
A Yes, my mother and I went to visit them sometimes.

Q Mr. McGee, you have seen him there at your house?
A Yes, we went to visit them at his house.
Q Where did you go after you met Mr. McGee?
[fol. 21] MR. DUGGAN: I object to that, your honor, as it is irrelevant and immaterial to this case.
THE COURT: That's right, you have a fight that happened 3 or 4 days after and now you are trying to bring something else in, Mr. Letts. Objection sustained.
MR. LETTS: I take exception to the Court's ruling.

(The above is defendant's bill of exception No. 5)

Q Isn't it a fact that your mother put you up to telling this on your stepfather and you are doing it here today for your mother?
A No, sir, that is not so. My mother didn't tell me nothing to say. She was trying to find out about it when she first found out I was hurt, and that is when I told her I was bleeding.
Q Your mother is not here today?
A No sir.
Q You don't know where she is, do you?
A No sir.
Q She hasn't been out to this home where you are living to see you since this happened, has she?
[fol. 22] A She came out to see me once and when my little brother died I saw her at the funeral.
Q Didn't this happen, wasn't your stepfather and mother in an argument 3 or 4 days before this happened and your stepfather slapped your mother?
MR. DUGGAN: I object to that, your honor, as it is irrelevant and imaterial to this case.
THE COURT: Objection sustained.
MR. LETTS: Note our exception, your honor.

(The above is defendant's bill of exception No. 6)

MR. LETTS: That' all, no further questions.
MR. DUGGAN: I have no further questions.

DR. F. B. WELLER,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Duggan.

Q You are Dr. F. B. Weller?
A Yes, sir.
Q You are a graduate of what meidcal school, doctor?
A I graduated from the University of Louisville Medical School at Louisville, Kenutcky.
[fol. 23] Q When was that, doctor?
A In 1946.
Q Are you a licensed and practicing physician here in Houston, Harris County, Texas?
A Yes sir.
Q How long have you been a licensed and practicing physician here in Harris County and the State of Texas, doctor?
A Since June of this year when I finished my interne work here in Houston at the Jefferson Davis Hospital.
Q Are you still there at the Jefferson Davis Hospital?
A Yes, sir, I have been there since June.
Q On or about the 9th day of August, this year, 1947, doctor, did you have occasion to examine a little girl by the name of Betty Fay Darty, the little girl who just left the witness stand?
A Yes sir.
Q State, approximately, doctor, just what time of the day or night did you examine her?
A It must have been around 3:00 P.M.
Q Three o'clock in the afternoon?
A Yes sir, about that time.
Q Did you make a thorough examination of her private parts, doctor?
A Yes, I did.
[fol. 24] Q Dr. Weller, as these gentlemen here on the Jury are laymen, could you tell them in plain terms just what you found was the matter with the little girl, Betty Fay Darty, when you examined her?

A Yes. You just want what I found in my physical examination of her?

Q Yes?

A Well, the outer parts of the child's privates, meaning the vagina and the lips of the vagina were blood tinged, and so were the interior parts of her vagina. The opening of her vagina was stretched evenly around and it was blood tinged. At the end of the vagina canal, there is the cervix uteri, which is the neck of the uterus which opens into the womb, and the cervix uteri had blood on it and it was inflated and tender. The cervix canal was stretched evenly all the way back to the womb. There were no jagged cuts or tears on either the vagina or cervix, but they were stretched and bloody. Her hymen was all broken, or torn out, and that is about all.

Q The hymen and the cervix uteri are just back of the vaginal opening, is that right?

A Yes, sir.

Q That is commonly known to be the opening of the vagina, the hymen, isn't it? Can you explain the hymen for us?

[fol. 25] A Yes. The hymen is a thin membrane that you can nearly see through which is located just back in the vagina and in this case there was no hymen.

Q In other words, the hymen was completely torn out?

A Yes, it must have been.

Q And you say that even the opening to the womb was blood tinged?

A Yes sir.

Q Something had penetrated her privates as far as the physical part of her body there would permit it?

A Yes sir, but . . .

MR. LETTS: We object to that, your honor, as it is asked to inflame the minds of the Jury.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 7)

Q Go ahead, doctor, continue your answer to the question?

A The lips of the cervix canal, which is the opening to the womb, had blood on it, and the walls of the vagina

and cervix were stretched, tender and inflated. To have blood at the opening of the womb does not mean, however, that something had penetrated that far. It could have been but to have blood on those interior parts it could have meant the heavy blood on the outside caused it to [fol. 26] be tinged on the inside.

Q How about the walls of the vagina?

A The walls of the vagina were stretched, tender and inflated.

Q How far back did that condition exist, doctor?

A That is hard to say because, as you understand, in children the length of the vagina and cervix wouldn't be over one and a half inches and I would hesitate to say how far back it was stretched, or irritated.

Q Could you determine from your examination of her whether the injury was a fresh one or an old one?

A They seemed to be fresh injuries.

Q And that condition of her private parts could have been caused by the penetration of a male organ, could it not, doctor?

A Yes, it could have.

Q You made this examination of this little girl, Betty Fay Darty, here in Harris County, didn't you, doctor?

A Yes sir.

MR. DUGGAN: That's all, thank you, doctor.

CROSS EXAMINATION

Questions by Mr. Letts.

Q When was she brought there to the Jeff Davis hos- [fol. 27] pital for you to examine, doctor?

A My record here shows that I examined her at 2:45 P.M. on the 9th day of August, 1947.

Q Now, doctor, upon your examination of this little girl, which you have just explained to the jury, can you tell the jury whether or not her hymen was broken?

A I saw no hymen in this child at all.

Q Didn't you find any of the hymen flesh, or fragments of it, remaining there?

A No, I did not.

Q Now, a finger of a person could cause that condition, couldn't it?

A Yes, it could.

Q In a child of that age don't you sometimes find the vagina raw or swollen where on occasions they use themselves, you know what I mean, don't you, doctor?

A I have seen no series, meaning a good many cases, on that, but I will say that a small percentage of children may use themselves but that would be pretty young at her age to do it—it would be quite young, but it could be possible.

Q Did you meet the mother of this little girl at the time she brought the child over to the hospital?

A I believe I met the mother. There was a lady there with the child, and I believe she was the mother, but I [fol. 28] am not sure as I don't remember.

Q Did the mother of this little girl appear to be excited, or anything like that?

A No, she didn't seem to be excited at that time, in fact, you would be surprised at the number of those kind of cases that we have here. They are quite common at times.

Q You are not telling this jury that it was a penis that penetrated that little girl and tore out the hymen, are you?

A They asked me if it could have been and I said it could have been a male organ that did it.

Q It could have been a finger, too, couldn't it—you are not telling this jury it was a penis, are you?

A No, I cannot say that positively.

MR. LETTS: That's all, thank you, doctor.

MR. DUGGAN: No more questions.

THE STATE RESTS, YOUR HONOR.

MR. LETTS: Your Honor, the Defendant wants his wife, Willette Loper, who we subpoened, here to testify in his behalf.

THE COURT: Is she here now?

MR. LETTS: No, she hasn't appeared, but I think we can get her if given time.

THE COURT: If she isn't here we can't wait for you to get her.

MR. LOPER: Judge, I want my wife here to testify, she was (Defendant) subpoened to be here.

THE COURT: No, this trial has to go on if she isn't here.

MR. LETTS: Note our exception, Your Honor.

MR. OTIS LOPER, THE DEFENDANT,

took the witness stand in his own behalf, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Letts.

Q What is your full name?
A Otis Milton Loper.
[fol. 29] Q Mr. Loper, how old are you?
A I am 34 years old.
Q When were you born?
A In 1913.
Q What is your native State?
A Mississippi.
Q How long have you been living here in Texas?
A I came to Texas last November.
Q Who did you come here with?
A My wife.
Q How long had you been married previous to the time you came to Texas?
A We got married in 1945.
Q Did you come directly to Houston, Texas, then?
A No, sir.
Q Where did you live before you came here?
A I lived in Philadelphia, Mississippi, and then I moved to Jackson, Mississippi, and lived ther for awhile and then I moved to Hattiesburg, Mississippi, and lived there for awhile, and then we moved to Louisiana where I worked in the oil fields for awhile, and then we moved back to Mississippi.
Q How long have you been in Houston?
A About a year. We came here last November.
Q Who came with you?

[fol. 30] A Just my wife.

Q Did your step-daughter come with you at that time?

A No sir.

Q When did she come here to Houston?

A We went and got her in June, but I don't remember the date.

Q Last year or this year?

A This year.

Q Where did you live here in Houston?

A 801 Whitney Drive.

Q How long have you lived there, or when did you move there?

A Last December.

Q While you were living there was any children born to you and Mrs. Loper?

A Yes, a boy.

Q Your wife went to Mississippi and got this young girl and brought her back here?

A She went to Alabama.

Q And brought her back to Houston?

A Yes sir.

Q Where were you working at that time?

A For Swift & Company at 1102 Commerce Street.

Q It is charged here that on or about the 9th day of August, 1947, you committed as assault upon your step-daughter, Betty Fay, who is 8 years old, will you tell [fol. 31] us what happened, in your own words?

MR. MEYERS: Your honor, we object to that in narrative form, and would like for his counsel to interrogate him in question and answer form.

THE COURT: Objection sustained; interrogate him, Mr. Letts.

MR. LETTS: All right, your honor.

Q Were you at home on August 9th, 1947?

A Yes, sir.

Q Who was with you?

A My wife. She got up at eight o'clock and went to the grocery store with Mrs. Baker. She was back at nine o'clock. She fed the baby before she left. When my wife left the house and went to the grocery store with Mrs. Baker I was left at home there with my little baby boy,

who was about 4 months old, and the little girl, Betty Fay Darty, was there. My wife fed the baby before she left and the baby wouldn't hardly suck the bottle of milk; he was crying.

THE COURT: Interrogate your witness, Mr. Letts.

MR. LETTS: He is telling what happened, your honor.

THE COURT: All right, but interrogate him.

Q You say that the baby was crying and your wife had gone to the store with Mrs. Baker?

[fol. 32] A That's right.

Q How long had they been gone when they got back home?

A About an hour.

Q Where did they go, did they go to more than one place?

A I really don't know.

Q What happened upon their return from where-ever they went?

A When they got back the little girl ran out of the house and met her mother as usual and wanted to know if she had brought her some ice cream and candy. I had given my wife enough money to buy that extra stuff, but she didn't buy the ice cream and candy.

Q Did you help your wife unload the groceries?

A Yes, and there was some big boxes in there and I told her they were too big for her to carry but she lifted some of them anyhow.

Q But you took most of the groceries into the house, you carried them in there?

A Yes sir.

Q What happened after you took the groceries into the house, did you and your wife have an argument?

MR. DUGGAN: We object to that your honor, as that is a leading and suggestive question.

THE COURT: Objection over-ruled.

A Yes, we didn't get along very good; we did have an argument.

[fol. 33] Q What was said in that argument between you and your wife, Mr. Loper?

A My wife got mad at me because I didn't clean up the house while she was gone.

Q Your wife got mad at you for not cleaning up the house?

A She sure did.

Q While your wife was gone did you, at any time, assault that little girl, Betty Fay Darty?

A No, I did not. I didn't stay in the house hardly at all with her during the time my wife was gone. I took the baby boy out in the back yard to try and stop him from crying and to take care of him until my wife came back.

Q Has your wife tried, at different times during your marriage, to send you to the penitentiary, or threatened to try and send you to the penitentiary?

A Yes. She threatened to have me put in jail several times, and one time at the S.Y.S. Food Market when I left her there, and Mr. Smith, who works there, can verify that statement.

Q Do you know a man named McGee?

A Yes sir, Arch McGee.

Q Has this Mr. McGee been visiting your house, and if so, how long?

A His son has.

[fol. 34] Q This Mr. McGee's son had been visiting in your home?

A Yes.

Q How old is his son?

A About 14 or 15 years old.

Q Did this McGee boy take the little girl, Betty Fay, over to his house?

A Yes, he did.

Q Did you see this 14 year old McGee boy and Betty Fay together often?

A Yes, I saw them together quite often.

Q Did you remonstrate with your wife about her actions in letting the little girl go over to the McGee boy's house?

A Yes, I did.

MR. DUGGAN: Your honor, we object to that as being immaterial to this case.

THE COURT: Yes, what is the materiality, Mr. Letts.

MR. LETTS: It is, your Honor, to show what caused the trouble between the defendant and his wife that would cause her to . . .

THE COURT: Mr. Letts, let's confine the testimony to this matter of the charge, this matter which is on trial.

MR. LETTS: Yes, your honor.

Q Was your child, your baby boy, crying at the time [fol. 35] you went out to the car in the drive-way when your wife and Mrs. Baker came in from the grocery store?

A Yes.

Q Was the little girl crying when your wife drove up there about nine o'clock with the groceries?

A No.

Q And she went out to see her mother when she came in with the groceries?

A Yes sir, she ran out a little sooner.

Q When you were taken to jail your step-daughter was left there at the house with the little baby boy?

A Yes, they were left there with my wife.

Q The little girl was left with your wife that morning, wasn't she?

A I don't understand your question.

Q Your wife went to town, or to the grocery store somewhere, with Mrs. Baker, didn't she?

A Yes sir.

Q And she came back home, didn't she?

A Yes sir.

Q When your wife came back home with Mrs. Baker did the child, the little girl, go out to the car with you?

A Yes sir, she went ahead of me.

Q And later on your little step-daughter and your [fol. 36] wife went to town, isn't that right?

A That was what I was told, as I left there first.

Q They went to the Jefferson Davis Hospital, didn't they?

A Yes.

MR. DUGGAN: We object to that, your honor, as it is hearsay.

THE COURT: Objection sustained.

Q When were you arrested?

A It was around about five-thirty or six-thirty o'clock in the evening on August 9th.

Q Who was with the officers at the time you were arrested, Mr. Loper?

A My wife and the little girl, Betty Fay.

Q When you were arrested by the police officers, how far were you from your home at that time?

A About 4 blocks.

Q Did your wife go with you and the officers when you were arrested, or did she get out of the car and go with the little girl?

A She got out of the car and went with the little girl towards home.

MR. LETTS: That's all I have, your honor.

CROSS EXAMINATION

Questions by Mr. Duggan.

[fol. 37] Q Loper, you say your wife and Mrs. Baker left you there at home with the little 8 year old stepdaughter and the little baby boy?

A Yes sir.

Q At the time they left you there with Betty Fay Darty, was there anything wrong with her—nothing was wrong with her then, was there?

A There was nothing wrong with her at any time.

Q She wasn't bleeding from her privates at any time while she was there in your care?

A Personally, I couldn't say.

Q Wasn't there any blood on her privates?

A I don't know.

Q You lived there in a garage apartment back of 801 Whitney Drive, didn't you?

A Yes sir.

Q How far is that garage apartment from the houses on either side of it?

A I don't know exactly. There is a house across the street in front of this other house at 801 Whitney.

Q You were in the garage apartment and how far is that from the nearest house, or how far back is it from the street?

A About 125 feet, I would say, approximately.

Q You have one bedroom in that garage apartment?

[fol. 38] A Yes sir.

Q And did all 4 of you sleep in there, you, your wife, baby and Betty Fay?

A Yes sir.

Q You all slept in that one bedroom?

A Yes.

Q And there was no blood on the sheet of that bed that morning?

A No.

Q And your wife left for the store with Mrs. Baker around nine o'clock?

A About eight o'clock.

Q And they came back about eleven o'clock that morning?

A No sir.

Q What time was it then?

A Nine o'clock.

Q And right after they came back you had occasion to leave there, didn't you?

A Not right after they got back home, no.

Q What time did you leave there?

A Around eleven o'clock.

Q You and your wife went over and visited Betty Fay when she was living with her grandparents in Alabama about a year ago, didn't you?

[fol. 39] A It has been over a year ago.

Q And didn't you molest her, or play with her private parts, on that occasion when you were in Alabama?

A No, I never have played with or touched her private parts.

Q And then Betty Fay was brought to Houston?

A Yes.

Q And she had been here about 2 months up to the time of this occurrence on August 9th?

A She came here sometime in June. I don't know the date.

Q She came in June and she had been here 2 months?

A No, she hadn't been here 2 months.

Q Hadn't you molested her on those two occasions?

A No, sir.

Q And hadn't you threatened her and told her what you would do to her if she told anyone about it?

A No.

Q You penetrated Betty Fay's private parts with your penis on that morning of August 9th, 1947, didn't you?

A No.

Q After you came to town on that morning of August 9th, you know now that Betty Fay told her mother what happened, and her mother immediately took her to the Jefferson Davis Hospital where she was examined by a doctor, and they found out what happened to her, isn't that right?

[fol. 40] A I know what I was charged with and that's all.

Q And the officers picked you up between five-thirty and six-thirty that same afternoon?

A Yes sir.

Q And you heard Betty Fay testify that the last time you molested her, she saying you put your private parts in her private parts, and soon after when her mother discovered she was hurting and bleeding, her mother took her to the hospital?

A Yes, sir.

Q You heard her say that?

A Yes.

Q And you say you never have touched her at all?

A I never have touched her privates at all.

Q You never had sexual intercourse with Betty Fay Darty?

A No sir.

Q She is a truthful child, isn't she?

A As far as I know she is.

Q Where is your wife now?

A I don't know. I have been in jail. I only know where I heard she was.

Q Don't you know that the reason your wife left you was because as soon as she knew you had raped this 8 year old child of hers, she left you?

[fol. 41] MR. LETTS: Your honor, I object to that.

THE COURT: Over-ruled, this is cross-examination, Mr. Letts.

Q You know that is the reason your wife left you and refused to live with you, because you raped her 8 year old daughter, isn't that right?

A No, sir, that is not the reason she left me.

Q You can't give me the reason she left you, can you?

A I think I can.

Q What is the reason?

A She had been going to beer parlors here in town all the time with men.

Q When?

A When I was in jail.

Q She didn't do that before you were put in jail?

A I don't know. I was at work.

Q Didn't your wife confront you with her little girl, Betty Fay, and accuse you of this crime you are charged with?

A No sir.

Q You know that she can testify for you, don't you?

A I don't know whether she could or not.

Q During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

[fol. 42] A About twice in the past ten years.

Q How about on May 7th, 1940, weren't you arrested . . .

MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

THE COURT: Well, let him finish the question, Mr. Letts.

Q All right, On May 7th, 1940, what were you indicted and convicted for?

A Burglary.

Q Where was that?

A Carthage, Mississippi.

Q What did you get for that?

A Five years in the penitentiary.

Q On January 15th, 1935, what were you indicted and convicted for then?

A Burglary.

MR. LETTS: We object, your honor, as that has been over ten years.

MR. DUGGAN: It is not ten years from 1940, your honor.

THE COURT: He is following the convictions and that is the correct order in which they come, isn't it, Mr. Duggan?

MR. DUGGAN: Yes, your honor.

[fol. 43] MR. LETTS: Note our exception, your honor, as that happened more than 10 years ago.

(The above is defendant's bill of exception No. 8)

Q What were you indicted, tried and convicted for then on January 15th, 1935, in Brushy Mountain Parish, Petros, Tennessee?

A Burglary.

Q What did you get for that?

A Four years.

Q How about October 27th, 1931, what . . .

MR. LETTS: Your honor, we object to that and ask the Court to instruct the jury not to consider it. That reaches way back to 1931 and the Court knows it would prejudice and inflame the minds of the jury in this case.

THE COURT: Objection over-ruled.

MR. LETTS: Note our exception.

(The above is defendant's bill of exception No. 9)

Q Where were you arrested on November 29th, 1934?

A In Chattanooga, Tennessee.

Q What about October 27th, 1931, what were you convicted for in Parchman, Mississippi, then?

A Burglary.

[fol. 44] Q What did you get for that?

A Six months, I think.

Q There have been so many offenses you have committed that you can't remember them straight, can you?

MR. LETTS: We object to that remark, your honor.

THE COURT: Objection sustained.

Q It was for burglary in 1931?

A Yes.

Q Have you always gone by the name of Otis Loper?

A Not always.

Q What other names have you gone by?

A Milton Cummings.

Q That was in Mississippi, wasn't it?
A Yes sir.
Q What were you indicted and tried for on that case in Mississippi in 1932?
A Burglary.
Q How much time did you get on that conviction?
A Two years.
Q And that was under the name of Milton Cummings?
A Yes.
Q And that is 4 times that you have been convicted of burglary, a felony?
A Yes.
[fol. 45] MR. DUGGAN: That all, no more questions.

REDIRECT EXAMINATION

Questions by Mr. Letts.

Q Now, tell these gentlemen of the jury, that after going to the penitentiary all of those times that your desire, on coming out, was to lead a clean and different life?
MR. DUGGAN: We object to that question, your honor, as he is putting words in the defendant's mouth.
THE COURT: That is right, objection sustained.
Q What were your intentions when you got out of the penitentiary the last time, you live a different life?
A Yes, and to get a job and settle down.
Q And you got married and had a baby?
A Yes, but I just married the wrong woman.
Q And while you were in jail the baby was taken away from you and your wife?
A Yes sir, it was taken away from us and I didn't know where it was.
Q Now, Otis, I want you to face this jury and tell this jury whether or not you are guilty of this offense you are charged with here?
A I am not guilty of it.
Q And you have been in jail since you were arrested, [fol. 46] isn't that right?
A Yes, I have.

Q Do you know where your wife is now?
A No, sir.
Q You haven't heard from her?
A No, I haven't heard from her since the baby died soon after I was arrested.
MR. LETTS: That's all.

RECROSS EXAMINATION

Questions by Mr. Duggan.

Q After you said you wanted to go straight after going to the penitentiary 4 times and getting out 4 times, you ravished and raped this little 8 year old girl, Betty Fay Darty, didn't you?
A No, sir.
Q And you don't know how she got that injury and caused her private parts, or vagina, to bleed, do you?
A No.
Q And you left the house there soon after her mother returned from the store?
A I had some business to take care of at the Uptown Clinic. Yo have to have a health card where I worked and mine had run out, and my boss told me to get one and I went down to the Uptown Clinic, which is downtown, to get it.
[fol. 47] Q Did you say you and your wife had a fight when she got back from the store?
A Yes, we had an argument.
Q Wasn't that about raping this little girl?
A No, nothing was said about her.
Q You told the little girl what you would do to her if she said anything about it and so you wasn't afraid that she would say anything, were you?
A No, that's not right.
Q But she did say something and you and your wife had a fight about it?
A No, that wasn't what we had the fight about.
MR. DUGGAN: That's all.

REDIRECT EXAMINATION

Questions by Mr. Letts.

Q You say you went down to the Uptown Clinic to get a health card?

A Yes sir.

Q And you took a blood test?

A Yes sir.

Q Have you got that certificate?

A No, sir, I believe I gave that to you.

Q But you did go down there and get your health card, or had it renewed, so you could work?

[fol. 48] A Yes sir.

Q Now, Mr. Loper, can you tell this jury how you think the little girl, Betty Fay, received that injury to her private parts?

A Yes. Mr. McGee's son was always riding over to our house and around there on a bicycle and the little girl went over there occasionally to spend the night with them, and I think it happened over there at the McGee house. I was after my wife about that all the time, about letting the little girl go over there.

Q Then if it happened, how do you think it happened?

A If it happened, I think that boy did it.

Q You think the McGee boy did it, if it happened?

A Yes sir.

Q Anyway, Mr. Loper, after you left the Uptown Clinic you were on your way home and was arrested by the officers?

A After I left the clinic I met a couple of boys I run around with and we went to a show in town.

Q And then you went home, or was on your way home and was arrested?

A Yes sir.

MR. LETTS: That's all, THE DEFENDANT RESTS.

MR. DUGGAN: THE STATE RESTS.

EVIDENCE CLOSED.

(Certificate omitted in printing)

PETITIONER'S EXHIBIT No. 8

IN THE CIRCUIT COURT OF LEAKE COUNTY,
MISSISSIPPI
APRIL TERM OF, 1940

No. 1597

STATE OF MISSISSIPPI

vs.

OTIS LOPER

Came the District Attorney who prosecutes for the State and came also the defendant in his own proper person, both of whom announced ready for trial, came the jury of twelve men towit: Rufus Logan and eleven others, who having heard the evidence both for the State and the defendant, and having received the instructions of the court and argument, retired to the jury room to consider of their verdict; returned into open court the following verdict "We the jury find the defendant guilty as charged in the indictment, whereupon the defendant was asked by the court if he had anything to say why a judgment should not be pronounced against him, said naugh. The court thereupon sentenced the defendant Otis Loper to serve a term of five years in the State Penitentiary and stand committed until fully executed.

PERCY M. LEE
Judge

[Certificate Omitted in Printing]

PETITIONER'S EXHIBIT No. 9

No. 65629

STATE OF TENNESSEE

vs.

OTIS LOPER

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE—DIVISION I

INDICTMENT

December 21, 1934

Court met pursuant to adjournment, present and presiding the Honorable Charles W. Lusk, Judge, etc., when the following proceedings were had, to-wit:

* * * *

65629 State v. Otis Loper—Burglary

The Grand Jurors in a body on December 21, 1934, returned into open Court an indictment against defendant, endorsed, "A TRUE BILL" Robert S. Walker, Foreman of the Grand Jury; State of Tennessee vs. Otis Loper. T. A. Gillespie Proseeutor; Filed: December 21, 1934. Hays Clark Clerk, as follows:

State of Tennessee, Hamilton County, Criminal Court, December, 1934 Term.

The Grand Jurors for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to inquire for the body of the County afroesaid, upon their oaths aforesaid, present:

That Otis Loper, heretofore on the 29th day of November, 1934, in the County aforesaid did unlawfully, feloniously and burglariously break and enter into the business house of Templeton's Inc., a Corporation, with intent to commit a felony, to-wit a Larceny, and did then and there unlawfully and feloniously take, steal and carry away Eight Gold Bulova strap watches, of the value of $231.00,

the personal property of Templeton's Inc., a corporation, with the intent to convert the same to his own use and to deprive the true owner thereof, against the peace and dignity of the State.

SECOND COUNT:

The Grand Jurors of the State aforesaid, being duly summoned, elected, impanelled, sworn and charged to inquire for the body of the County aforesaid, upon their oaths further present:

That Otis Loper heretofore on the 29th day of November, 1934, in the County aforesaid, did unlawfully, feloniously and fraudulently receive and conceal, with intent to deprive the true owner thereof Eight Gold Bulova strap watches, of the value of $231.00 the personal property of Templeton's Inc., a corporation which had before that time been unlawfully and feloniously taken, stolen and carried away, and he the said Otis Loper well knowing at the time he so received and concealed said property as aforesaid, that the same had been so stolen as aforesaid, against the pease and dignity of the State.

/s/ PEABODY HOWARD
Attorney General

* * * *

Thereupon Court adjourned until tomorrow morning at nine o'clock.

/s/ CHARLES W. LUSK, Judge

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE—DIVISION II

January Term — January 9, 1935

JUDGMENT

Court met pursuant to adjournment, present and presiding the Honorable L. D. Miller, Judge, etc., when the following proceedings were had, to-wit:

* * * *

65629 State v. Otis Loper—Burglary

Came the Attorney General and the defendant in person, and this case was tried on the defendant's plea of not guilty before the Court and the following jury: Harry Price, J. H. Bullard, J. H. Allen, Paul Smith, John Boren, J. R. Howell, John Henry, George Flinn, H. A. Odum, Jack Smith, Jim McGuire and J. M. Randall, all duly qualified, elected and sworn, who having heard the proof, arguments of Counsel and the charge of the Court on oath say defendant is guilty under First Count and fix his punishment at not more than four (4) years in the Penitentiary.

It is therefore adjudged that defendant be infamous, and he be confined in the penitentiary for a term of not more than four (4) years and pay or secure costs. Execution will issue against defendant for the cost. It is suggested by the Court that defendant have hospital treatment as needed.

* * * * *

Thereupon Court adjourned until tomorrow morning at 9:30 A. M.

/s/ L. D. MILLER, Judge

[Certificates Omitted in Printing]

PETITIONER'S EXHIBIT No. 10

INDICTMENT

The State of Mississippi,
Scott County,

In the Circuit Court of Scott County, Mississippi, at the October Term, in the Year of our Lord Nineteen Hundred and Thirty-One

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men of Scott County, in the State of Mississippi, elected impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present:

That Fred Loper and Otis Loper and Louis Avery in said County, on the ____ day of October A.D. 1931 did then and there wilfully, feloniously and burglariously break and enter the storehouse of P. H. Underwood in which goods, merchandise and other things of value were kept for sale, the property of P. H. Underwood, with intent of them the said Fred Loper and Otis Loper and Louis Avery then and there wilfully, feloniously and burglariously take, steal and carry away certain goods and merchandise, the property of P. H. Underwood found kept for use and sale in said storehouse, a particular description of which is to the Grand Jurors unknown, of the value of $200.00 in lawful money, contrary to the form of the Statute in such case and provided, and against the peace and dignity of the State of Mississippi.

/s/ Percy M. Lee
District Attorney

INDICTMENT

No. 858

CIRCUIT COURT
Scott County.
October Term, 1930

THE STATE OF MISSISSIPPI

vs.

FRED LOPER & OTIS LOPER AND LOUIS AVERY

/s/ Percy M. Lee
Prosecutor

A True Bill:

/s/ [Illegible]
Foreman Grand Jury

Witnesses' Names:

/s/ Wes Cox
/s/ Duff Johnson
/s/ Hi Johnson

Filed this the 7th day of Oct 1931

/s/ Floyd Moseley Clerk

Recorded —— day of —— 193—.

[Certificate Omitted in Printing]

MINUTES, October Term, 7th Day of October, 1931
Minute Book 7, Page 278

State

vs.

Fred Loper, Otis Loper and Louis Ivery

This cause came on this day to be heard and upon arraignment each defendant entered pleas of guilty, as charged in the indictment.

It was therefore the order of the court that they be sentenced at a further day in the term.

[Certificate Omitted in Printing]

MINUTES, October Term, 16th day of October, 1931
Minute Book 7, Page 287

State

vs.

Fred Loper, Otis Loper

This cause came on again on this day to be heard, the defendants on a former day when arraigned plead guilty to a charge of burglary, and *owing* their ages, Fred Loper being only 19 years of age and Otis Loper being only 18 years, the court having this under consideration sentenced each defendant to serve a term of 6 months in the penitentiary, and stand committed to jail until they be transported to the penitentiary, by the proper officer.

[Certificate Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

December 12, 1969

MEMORANDUM AND ORDER:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The application of this petitioner for habeas corpus relief comes before this Court again. His previous applications are so numerous as to fill his file to overflowing. They present an almost insuperable challenge to one who would track their points and their holdings. As early as 1959 the Court of Appeals of this Circuit had occasion to refer to the prolixity of applications by this petitioner [*Loper* v. *Ellis*, 263 F.2d 211 (1959)]. On November 10, 1969, this Court held a plenary hearing pursuant to remand by the Court of Appeals [*Loper* v. *Beto*, 383 F.2d 400 (1967)] directing an evidentiary hearing on the question as to whether petitioner had been deprived of his right to appeal.

In 1947 petitioner was convicted of the rape of his eight year old stepdaughter in one of the criminal district courts of Harris County, Texas. He was represented by H. James Letts and L. D. Harris. Both at that time were experienced and competent attorneys at the Houston Bar, well versed in the trial of criminal

cases. The conviction at the hands of a jury was not appealed.

Following the remand to this Court, competent counsel was appointed to assist petitioner in the gathering of evidence, the preparation for trial and the presentation of his case to this Court. Prior to trial, both counsel and petitioner were instructed that in addition to the single issue remanded to this Court, petitioner was not only permitted, but directed, to raise any points which conceivably might be raised in his behalf. The purpose obviously was the effort to afford petitioner a hearing on any and all questions which might affect the legality of his confinement. Pursuant thereto, a number of other points were raised. They were:

(1) That having been released on parole in 1962, his parole was revoked (for car theft, and escape from jail) in 1963 without his having been afforded a hearing before the Parole Board;

(2) That at the time of his trial in 1947, and while appearing as a witness in his own behalf, on cross-examination he was asked by way of impeachment with reference to some two or more prior felony convictions, it being contended that he was not represented by counsel at the time of such prior felony convictions;

(3) That he was deprived of the testimony of his wife as a witness on his behalf as result of action by the state authorities;

(4) That his representation by counsel was inadequate and insufficient;

(5) That the totality of the circumstances surrounding his trial was such as to constitute fundamental unfairness;

(6) By reason of the fact that he was not present in the Grand Jury room when the witnesses were heard and the indictment returned against him, he was deprived of the opportunity to "confront the witnesses against him"; and

(7) At the time of sentencing, he was not represented by counsel.

At the outset it might be stated that petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony. Despite the passage of some twenty-two years since the trial, however, there was a surprising amount of credible evidence offered during the present hearing.

Petitioner's points are disposed of as follows:

Abandonment of the Appeal by His Court-Appointed Attorneys.

Mr. Letts, the attorney who took the lead in the defense of petitioner, has been dead a number of years. However, his partner at that time, L. D. Harris, is alive and well and appeared as a witness. He has testified on prior occasions in similar hearings with reference to the same matters. It is his testimony, which I find to be entirely credible and which I accept, that following the trial he and Letts discussed the matter of an appeal with petitioner; that petitioner advised his attorneys without qualification that he did not wish to, and would not take an appeal. Mr. Harris thought petitioner was very angry, and perhaps emotionally upset at that time. Thereafter, in an abundance of caution and to protect petitioner if he later changed his mind and desired to appeal, Harris filed a formal motion for new trial within the time prescribed by the state practice, this being a jurisdictional requirement for an appeal. Neither he nor Letts were ever contacted by petitioner as to a change of heart and he was never asked by petitioner or anyone else to appeal his case.

It is petitioner's testimony that he wrote his attorneys that he desired to take an appeal and inquired of the trial judge with reference to procuring a copy of the necessary court records. He states that the trial judge referred him to the court clerk with respect thereto, Mr. Harris knew nothing of such letter. In light of the energy and diligence shown by the attorneys in representing the defendant at the trial, I am convinced that had such request been made they would have complied with their

duty with respect thereto. I find as a fact that petitioner made no such request of his attorneys and made no such request of the district judge or other state official. Hence I find this point without merit.

Parole Revocation.

It is undisputed that petitioner was granted parole in 1962 and paroled to the state of Mississippi under the Interstate Parole Compact. Several months thereafter he was charged with car theft and while being confined on such charge escaped from jail by sawing his way out with a hacksaw blade. Revocation of his probation was recommended to the Governor of the state of Texas and the Governor took the recommended action. Petitioner was a fugitive for approximately a year thereafter and ultimately was re-arrested. In this state the holding of a hearing by the Board of Pardons and Paroles is discretionary. *Ex Parte Sellars*, 384 S.W.2d 351 (Tex.Ct.Crim. App. 1964); *Ex Parte Lewis*, 339 S.W.2d 900 (Tex.Ct. Crim.App. 1960), *cert. denied*, 368 U.S. 960. Such hearings are not constitutionally required. *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *United States ex rel Heacock* v. *Myers*, 251 F.Supp. 773 (E.D.Penn. 1966); *Johnson* v. *Tinsley*, 234 F.Supp. 866 (D.Colo. 1964). Irrespective of any other consideration, it would appear that his admitted escape from custody and remaining at large for an extended period would constitute a valid basis for the revocation. This point is without merit and is denied.

Reference to Prior Felony Convictions.

With respect to this point petitioner undertakes to equate the reference in his cross-examination with respect to prior felonies, for impeachment purposes only, to those authorities wherein prior felony convictions, secured without the presence of counsel are used for enhancement of punishment. First, it should be noted that there is no evidence other than petitioner's own statement that he was not represented by counsel at the time of his prior convictions, which evidence, as stated above, I decline to accept as credible. Second, no objection on this ground

was made at the time that the impeaching testimony was offered. Had such objection been made, opportunity would have been offered for an inquiry into the matter and no doubt the trial judge would have taken appropriate action. As the matter was purely of an evidentiary nature, and particularly in the absence of objection, the question does not rise to constitutional stature and is not subject to collateral attack. *Cf. Luna* v. *Beto*, 395 F.2d 35 (5th Cir. 1968), *cert. denied*, 394 U.S. 966.

Failure to Offer the Testimony of the Wife as a Witness

This question has been raised by petitioner repeatedly in prior proceedings and after full consideration and evidentiary hearing, the point has been denied. I refer to *Loper* v. *Ellis*, C.A. 8469 (S.D. Tex. 1956), *Loper* v. *Ellis*, 224 F.2d 901 (5th Cir. 1955), and *Loper* v. *Rushing*, C.A. 2641 (E.D. Tex. 1959). These prior dispositions are bottomed on the fact that petitioner never showed wherein his wife's testimony would have been to his advantage. The question having heretofore been repeatedly determined, this Court adopts that action.

As a matter of interest, however, it should be noted that with respect to this issue, Mr. Harris has testified that the wife was in the corridor of the courthouse awaiting her time to testify earlier in the day. When he (Harris) went to the corridor to call her, he was told by bystanders that the lady was drunk, and had left the courthouse. A motion for continuance (at this point, in the middle of the trial) was denied.

Inadequate Representation of Counsel.

Petitioner here contends and has testified to minimal contact with his attorneys prior to and following the trial. He would have the Court believe that his lawyers had done nothing more than meet him at the courtroom, conduct the trial, and then abandon him. Such is not the case. From Harris's testimony I find as a fact that his attorneys, through their employed investigator, had contacted the various witnesses listed on the state's complaint well prior to trial and had ascertained the sub-

stance of their testimony; that the attorneys had examined carefully into the indictment for any flaw which they might find therein; that they had consulted fully with the district attorney with respect to a plea of guilty and an agreed sentence, had arrived at an agreement whereby the petitioner would plead guilty in return for a ten year sentence, a trade which petitioner declined to accept. I find as a fact that the representation of his counsel was entirely adequate and fully in keeping with the obligation of the attorneys concerned. They did the very best they could for him with what they had to work with.

The Totality of the Circumstances.

I am unable to determine to what the petitioner points under this claim other than the fact that the trial lasted no more than one day, being concluded in the afternoon rather than before noon as he has testified. It would appear that there was a clear-cut jury issue as to whether the petitioner had committed the offense, a question which the jury resolved against him. This point is likewise without merit.

Presence of the Attorney at the Time of Sentencing.

This point likewise has been raised on a number of prior occasions, at least one plenary hearing held, and resolved against petitioner. I refer to *Loper* v. *Ellis*, No. 12226 (S.D. Tex. 1958), aff'd. 263 F.2d 211 (5th Cir. 1959); *Loper* v. *Ellis*, No. 2236 (E.D. Tex. 1957). The testimony at such former hearings clearly shows that Mr. Letts was present at the time of the sentencing and did what he could in petitioner's behalf.

At the present hearing Mr. Harris testified that the matter of the sentencing was noted on Mr. Letts' calendar, that Letts left the office for the purpose of going to the courthouse for this purpose, and on his return discussed what had transpired with his partner, Harris. I find that petitioner's testimony to the contrary is completely false. This point is denied.

The Contention That the Right to Confrontation of Witnesses Includes Testimony of Such Witnesses Before the Grand Jury.

This point is considered frivolous and in denied without further comment.

As stated at the outset, petitioner has filed innumerable applications for relief. Pound for pound, he is probably the most prolific writer of writs to come before this Court. His applications, verified under oath, and his testimony in open court under oath, have been found repeatedly to be completely false. In the present hearing, as stated, with competent counsel to assist, he had been instructed to raise every point within his knowledge or desire. In the event of an application to appeal in forma pauperis, I expect to grant same, and in the event of affirmance, the clerk is instructed not to receive further applications from this petitioner, but to return them to him. Any further applications I consider to be an abuse of the writ.

The various points raised having been found to be without merit, the application is denied and the proceedings dismissed.

Done at Houston, Texas, this 12th day of December, 1969.

/s/ Ben C. Connally
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 66-H-657

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT

JUDGMENT

Pursuant to the Memorandum and Order filed this date, it is the judgment of this Court that petitioner's motion to vacate sentence be denied.

Done at Houston, Texas, this 12th day of December, 1969.

/s/ Ben C. Connally
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 29235

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Texas

(March 24, 1971)

Before GEWIN, MORGAN and ADAMS,*
Circuit Judges.

GEWIN, Circuit Judge: Petitioner Otis Loper appeals from the denial of his petition for writ of habeas corpus. After conducting a thorough and extensive hearing on the petition, Judge Connally denied the writ in an unreported opinion wherein he made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). We find no error in the findings and conclusions of the district court, and affirm.

Loper was charged and convicted of the statutory rape of his eight year old step daughter in the district court of Harris County, Texas on November 17, 1947. On November 20, 1947 Loper's motion for new trial was denied, and he was sentenced to serve fifty years in the state penitentiary. He did not appeal.

* Of the Third Circuit, sitting by designation.

After serving fifteen years of his sentence, Loper was paroled on November 9, 1962 from the Texas Department of Corrections and given permission to move to Mississippi where he was assigned to a Mississippi state parole officer for supervision. Loper's parole, however was of short duration. On February 5, 1963 he was arrested in Mississippi for car theft. Thereafter, when the Texas Board of Pardons and Paroles learned from the Mississippi Parole Board that Loper had been arrested for car theft and that the evidence against him was conclusive, the Board recommended to the Governor of the State of Texas that he revoke Loper's parole. In accordance with this recommendation recommendation the Governor on March 4, 1963, entered a parole revocation order and directed the issuance of a warrant for Loper's arrest. Before this order could be executed, however, Loper escaped from Carthage, Mississippi, jail and remained a fugitive for over a year. When he was finally apprehended on April 6, 1964, in St. Joseph, Louisiana, he was taken into custody and eventually transported to the Texas Department of Corrections where he has since remained incarcerated.

Beginning in 1949 Loper has unsuccessfully filed a steady succession of petitions for the writ of habeas corpus, in the State District Court, the Court of Criminal Appeals, and at least two United States District Courts.[1] Following Loper's most recent petition,[2] the district court held a plenary hearing on November 10, 1969 pursuant to the order of this court directing an evidentiary hearing on the question whether petitioner had been deprived of his right to appeal. Prior to the hearing petitioner and his court-appointed counsel were instructed that, in addition to the single issue remanded to the district court, petitioner should present any and all conceivable issues which might be raised on his behalf so that the legality of his

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[1] For the reported cases, see: Loper v. Beto, 383 F.2d 400 (5th Cir. 1967); Loper v. Ellis, 263 F.2d 211 (5th Cir. 1959); Loper v. Ellis, 224 F.2d 901 (5th Cir. 1955); Ex parte Loper, 223 S.W.2d 523 (Tex.Crim.App. 1949); Ex parte Loper, 219 S.W.2d 81 (Tex. Crim. App.), cert. denied 337 U.S. 946, 93 L.Ed. 1749 (1949).

[2] Loper v. Beto, 383 F.2d 400 (5th Cir. 1967).

confinement might be conclusively determined. In accordance with these directions the following points were raised: (1) the propriety of impeaching defendant by prior convictions wherein he was not represented by counsel; (2) the adequacy of representation of counsel; (3) the alleged suppression of evidence by the state; (4) the denial of parole revocation hearing; (5) and the denial of pre-trail discovery.

Impeachment by Prior Conviction

At his state court trial for rape in 1947, Loper took the stand and testified in his own behalf. During the cross-examination of Loper, counsel for the state asked him how many times he had been convicted of a felony in Texas or any other state. Loper readily admitted that he had been convicted of burglary on four different occasions during the period 1931-40—three times in Mississippi and one time in Tennessee. On one of the occasions in question he used the assumed name of Milton Cummings. No objection as to the validity of these convictions was raised and the records of the convictions were not offered in evidence.[3] The evidence in question was introduced solely for the purpose of impeachment; it did not relate to, or increase the punishment. There is not the slightest suggestion in the record that the state of Texas had any knowledge of a possible infirmity in the convictions. Loper now insists that evidence of these convictions was not admissible for the purpose of impeachment because the convictions were obtained in violation of the principles of *Gideon* v. *Wainwright*.[4] He claims that he did not have counsel at these trials and that he did not voluntarily or intelligently waive the right to counsel.

On this issue Loper places heavy reliance upon *Burgett* v. *Texas*.[5] which held that former convictions when coun-

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[3] Counsel for Loper objected to some of this evidence on the ground that one or two of the convictions were too remote in time.

[4] 372 U.S. 335, 9 L.Ed.2d 799 (1963).

[5] 389 U.S. 109, 19 L.Ed.2d 319 (1967).

sel was not provided or intelligently waived could not be used for the purpose of enhancement under the Texas Penal Code. By analogy he argues that the same rule should apply to the use of such former convictions for the purpose of impeachment. We decline to extend the teachings of *Burgett* to the situation here presented. The convictions mentioned have been of record for a number of years, yet the record before us does not disclose that any attack has ever been made upon those convictions. Except for the assertions of Loper the record fails to furnish any conclusive information as to the facts and circumstances surrounding his former convictions. So far as the record before us reveals, there are outstanding, unchallenged, state court convictions of felonies in the States of Mississippi and Tennessee. We recognize the force of Loper's argument to the effect that such convictions may have impaired his credibility in the minds of the jury as a witness in his own behalf; nevertheless, if the convictions possessed the infirmities which Loper claims, he has failed to make any effort to set them aside for over 30 years. No one else could have done so. Surely such an attack was available to him in view of the retroactive application of the *Gideon decision* which was decided over six years prior to the hearing under review. Furthermore, it is obvious to us that the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant. Although we do not feel bound on this issue by decisions of the Texas Court of Criminal Appeals, we do take note of the fact that decisions in the State of Texas have declined to accept Loper's contention.[6] Moreover, in the recent case of *Barboso* v. *Craven*,[7] the Ninth Circuit likewise refused

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[6] Bustillos v. State, —— S.W.2d ——, 8 CrL 2425 (Tex. Ct. Crim. App. Feb. 17, 1971). Sammons v. State, 456 S.W.2d 66 (Tex. Cr. App. 1970).

[7] 431 F.2d 698 (9th Cir. 1970). In so ruling the court stated:

> It is settled California law that a defendant may be impeached by prior convictions not withstanding California Penal Code § 1025. People v. Ricci, 239 Cal.App.2d 238, 48 Ca.Rptr. 631 (1966).

to grant relief in the circumstances here presented. The issue presented raises an evidentiary question. The fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal. In *Chapman* v. *California* the Court stated:

> We conclude that there may be come constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.[8]

Effective Representation of Counsel

Petitioner contends that the trial court erred in not holding that he was deprived of effective representation of counsel. Although the right to counsel means the right to effective assistance of competent counsel,[9] the Sixth Amendment does not guarantee subjectively satisfactory results for those accused of crime; nor does it guarantee errorless and prevailing counsel, or even the best counsel available.[10] As we said in *MacKenna* v. *Ellis*:[11]

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[8] 386 U.S. 18, 22. See also Dutton v. Evans, —— U.S. ——, 27 L.Ed.2d 213.

A typical example of the use of improper evidence which does not require reversal arises when perjured testimony is used *without* the knowledge of agents of or counsel for the state. See; Mooney v. Holohan, 294 U.S. 103 (1935); Jackson v. United States, 384 F.2d 675 (5th Cir. 1967), cert. denied 392 U.S. 932; Enzor v. United States, 296 F.2d 62 (5th Cir. 1961); Sears v. United States, 265 F.2d 301 (5th Cir. 1959); United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956).

[9] McMann v. Richardson, —— U.S. ——, 25 L.Ed.2d 763, 773 (1970).

[10] See: United States v. Rubin, 433 F.2d 442, 444 (5th Cir. 1970); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1969); Bendelow v. United States, 418 F.2d 42, 50 (5th Cir. 1969); Odum v. United States, 377 F.2d 853, 859 (5th Cir. 1967).

[11] 280 F.2d 592 (5th Cir. 1960).

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.[12]

Only if the attorney's conduct is "shocking to the conscience of the Court" can the charge of ineffective counsel prevail.[13]

After an evidentiary hearing at which petitioner was represented by court-appointed counsel at which petitioner himself testified on the matter, the trial court found the following facts: that Loper's attorneys [14] had contacted various witnesses listed on the state's complaint prior to trial and had ascertained the substance of their testimony; that the attorneys had examined the indictment for flaw; that they had consulted with the District Attorney with respect to the plea of guilty and an agreed sentence, had arrived at an agreement, whereby the petitioner would plead guilty in return for a ten year sentence, a trade which petitioner declined to accept; and finally that they took steps to appeal the judgment of conviction but were dissuaded from doing so by Loper.[15] From these facts

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[12] Id. at 599. See: Bendelow v. United States, 418 F.2d 42, 50 (5th Cir. 1969).

[13] United States v. Mancuso, 423 F.2d 23, 29 (5th Cir. 1970).

[14] Petitioner either retained or was assigned two attorneys to represent him on the rape charge. Both were experienced lawyers in the trial of criminal cases; one in fact had specialized for over 30 years in the defense of criminal cases.

[15] Although Loper insisted that his attorneys deprived him of his right to appeal, the district court dismissed this contention after making the following factual determination:

> "L. D. Harris, [one of petitioner's attorneys] testified on prior occasions in similar hearings with reference to the same matters. It is his testimony, which I find to be entirely credible and which I accept, that following the trial he and Letts [Loper's other attorney] discussed the matter of an appeal with petitioner; that petitioner advised his attorneys without qualification that he did not wish to, and would not take an appeal." (R. 278).

See: Lamar v. Wainwright, 423 F.2d 1104 (5th Cir. 1970); Ballard v. Howard, 403 F.2d 653 (6th Cir. 1968).

the court concluded that Loper's contention that he was deprived of effective representation of counsel was without merit.

Upon a full consideration of all of the testimony presented, this court must conclude that the findings of the district court were not clearly erroneous. Rule 52(a), F.R.Civ.P.

Suppression of Evidence

Petitioner claims that he was denied due process of law because the state suppressed evidence favorable to his defense. He contends that the state threatened to prosecute his wife, Willette Loper, for insufficient supervision of her daughter if she appeared at the trial and that this threat caused her to leave town so that she could not testify in his behalf.

With reference to the availability of Mrs. Loper as a witness and the possible relevancy of her testimony, it is fair to state that all of the evidence developed in the district court does not point in one direction. There was evidence tending to indicate that Mrs. Loper was present in the hallway of the courthouse during the trial, but that she was intoxicated. J. H. Letts, one of Loper's attorneys, although now deceased, testified in 1949 in a habeas corpus proceeding as follows:

> Your wife, Willette Loper, was here the time of your trial, but she did not take the witness stand and testify." She was outside of the Courtroom in the hall. She had too much to drink and couldn't take the witness stand. I called for her but she didn't come in the Courtroom.[16]

Defense attorneys asked for a continuance and the state trial court inquired of them as to the nature and materiality of Mrs. Loper's proposed testimony. Defense counsel indicated that Mrs. Loper's proposed testimony would relate to what "the little girl" (alleged victim) said

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[16] This statement appears in a short transcript in narrative form certified by the official Court Reporter of the Criminal Court of Harris County, Texas, on the 13th day of September 1949.

to Mrs. Loper upon her return from the grocery store following the alleged rape. The state trial judge denied the motion for continuance on the ground that such testimony would only corroborate that of the victim. It should be noted that there are strong indications in the record that Mrs. Loper took the victim to the hospital for a medical examination on the day the crime was supposed to have been committed.

While we do not necessarily agree with the reasons assigned by the Texas trial court for denying the motion, we cannot conclude that the ruling was of such magnitude and importance as to require a reversal of the finding of the United States District Court on this issue. It is important to remember that according to the victim's testimony the attack occurred in the absence of Mrs. Loper—she had gone to the grocery store. We also take particular note of the affidavit of Mrs. Loper in which she charged that the Texas authorities had threatened her in order to prevent her testimony. To say that this "purported affidavit" is of dubious quality merely echoes the accurate description of the affidavit in *Loper* v. *Ellis* [17] wherein the court said:

> It is dated April 26, 1948, and is addressed "To the Honorable Judges: Court of Criminal Appeals; State of Texas." It is certified as being a true copy by the Clerk of the Court of Criminal Appeals of Texas. The Harris County authorities charged with making the alleged threat are not named as individuals or by office. The affidavit does not give the address of the affiant, though appellant states it was made at Dora, Alabama, in Walker County. The seal of the justice of the peace is not shown on the certified copy, except for notation. Neither does the affidavit express a willingness on the part of affiant to return voluntarily to testify in person.

Our examination of the record, several exhibits and the decisions dealing with this case, fails to make clear just what testimony Mrs. Loper would have given if she had

[17] 224 F.2d 901, 904 (5th Cir. 1955).

testified. Her affidavit executed sometime after the trial does purport to constitute an *ex parte* assertion that she left town because of a "warning" from Harris County authorities; nevertheless, substantial evidence in the record contradicts this assertion. The testimony of Mr. Letts, counsel for the appellant at the original trial, contradicts it. Moreover, the transcript of the original trial strongly indicates that Loper and his wife were completely estranged following the alleged attack on Mrs. Loper's eight year old daughter. At his state court trial Loper testified that he had not heard from his wife "since soon after" he was arrested. He further testified that he and Mrs. Loper had a fight on the day of the alleged rape soon after Mrs. Loper returned from the grocery store, although he stated that the fight was not the result of any attack on the child. At one point in the trial he volunteered the statement, "I just married the wrong woman."

In rejecting the contention with respect to the suppression of evidence, the district court relied upon the fact that this question had been raised repeatedly in prior proceedings and asserted:

> This question has been raised by Petitioner repeatedly in prior proceedings and after full consideration and evidentiary hearing, the point has been denied. I refer to Loper v. Ellis, C.A. 8469 (S.D. Tex. 1956), Loper v. Ellis, 224 F.2d 901 (5th Cir. 1955), and Loper v. Rushing, C.A. 2641 (E.D. Tex. 1959). These prior dispositions are bottomed on the fact that Petioner never showed wherein his wife's testimony would have been to his advantage. The question having been heretofore repeatedly determined, this court adopts that action.

Further, the district court took note of the fact that Mr. Harris, surviving associate counsel who represented Loper during the rape trial, testified that he understood that Mrs. Loper was in the corridor of the courthouse during Loper's trial. He stated that he was informed by others present that she was drunk and had left the courthouse. In addition to the reasons assigned by the district court

on this point, we are firm in our judgment that the record amply supports the conclusion that the state did not suppress evidence by causing Mrs. Loper to leave.[18] For all of the foregoing reasons we are unable to conclude that the district court committed error with respect to this conclusion.[19]

Parole Revocation

Loper next attacks the Texas parole revocation procedure contending that he was denied equal protection of the law because his parole was revoked without a hearing. He argues that the Texas law in effect at the time of his parole revocation provided two dissimilar and discriminatory methods by which revocation could be accomplished. On the one hand, Article 781b of the Texas Code of Criminal Procedure delegated the power to revoke paroles to the Board of Pardons and Paroles, and provided the following revocation procedure:

> Sec. 20. . . .
>
> Whenever a paroled prisoner is accused of a violation of his parole on information and complaint by a law enforcement officer and/or probation and parole officer *he shall be entitled to be heard on such charges before the Board on such rules and regulations as the Board may adopt;* provided, however, said hearing shall be held within forty-five days of the date of arrest and at a time and place set by the Board. (Emphasis added)

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[18] The prosecution issued subpoenas for several persons including the mother of the victim, Willette Loper. All of the subpoenas were served except for the subpoena on Mrs. Loper; her subpoena had been returned unserved with the notation that her whereabouts were unknown. The prosecution did not attempt to call Mrs. Loper to the witness stand because under Texas law a wife cannot be used as a witness against her husband.

[19] Lamar v. Wainwright, 423 F.2d 1104, 1106 (5th Cir. 1970); Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); Washington v. Smith, 417 F.2d 301, 302 (5th Cir. 1969); Heath v. Wainwright, 408 F.2d 1020 (5th Cir. 1969). Cf. Ballard v. Howard, 403 F.2d 653 (6th Cir. 1968).

By contrast, Article 4, Section 11, of the Texas Constitution made no reference to revocation procedure but simply granted the governor the "power to revoke paroles and conditional pardons." Petitioner interprets the above two provisions to allow those whose parole is revoked by the Parole Board to have a revocation hearing, but to deny a hearing to those whose parole is revoked by the governor. From this view he insists that the Texas criminal procedure is in violation of the equal protection clause because it prescribes a different procedure for persons in like situations.

In a proper case we might tend to agree with petitioner's statement of the law, but under the facts and in the circumstances presented by the record before us we reject his contention. There is respectable authority to the effect that the United States Constitution does not compel a state to provide a hearing before exercising its discretion to terminate parole.[20] Nevertheless, it is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions. Thus, once a state has determined to provide by statute the right to a hearing on the question of parole revocation, as Texas did with Article 781b, Tex.R.Cr.P., it must accord the benefits of that procedural right equally to all parolees in

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[20] Although the traditional view is that the Constitution does not require a hearing before terminating parole, see Escoe v. Zerbst, 295 U.S. 490, 79 L.Ed. 1566 (1935); Burns v. United States, 287 U.S. 216, 77 L.Ed. 266 (1932); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949) aff'd. 320 U.S. 880, 95 L.Ed. 656 (1950); Goldsmith v. Sanford, 132 F.2d 126 (5th Cir. 1942) cert. denied 318 U.S. 744, 87 L.Ed. 1122; Hamrick v. Boles, 231 F. Supp. 507 (N.D. W. Va. 1964); there exists critical commentary which would require the application of *due process* in the granting and revocation of parole. The following articles, notes and comments are representative: Cohen, *Sentencing, Probation and the Rehabiliative Idea*, 47 Tex.L. Rev. 1 (1968); Milligan, *Parole Revocation Hearings in California and the Federal System*, 4 Cal. West. L. Rev. 18 (1968); Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L. 175 (1964); Comment, *Rights v. Results: Quo Vadis Due Process for Parolees*, 1 Pacific L.J. 321 (1970); Comment, *Constitutional Law; Parole Status and the Privilege Concept*, 1969 Duke L.J. 139, 28 So. Cal. L. Rev. 158 (1955).

similar circumstances.[21] Failure to afford a hearing on a legitimate request in circumstances and under facts which meet the requirements and provisions of the Texas statute might deprive a parolee of "equal protection" of the state law, a right guaranteed by the appropriate provision of the Fourteenth Amendment.

Loper relies on the statute cited above and rules and regulations of the Board of Pardons and Paroles adopted pursuant to its provisions. Such rules and regulations provide for a hearing within forty-five days after arrest on a parole revocation warrant. He contends that he requested a hearing but was not given one.

With respect to the issue of parole revocation, the United States District Court concluded:

> It is undisputed that petitioner was granted parole in 1962 and paroled to the state of Mississippi under the Interstate Parole Compact. Several months thereafter he was charged with car theft and while being confined on such charge escaped from jail by sawing his way out with a hacksaw blade. Revocation of his probation was recommended to the Governor of the state of Texas and the Governor took the recommended action. Petitioner was a fugitive for approximately a year thereafter and ultimately was re-arrested. In this state the holding of a hearing by the Board of Pardons and Paroles is discretionary. Ex parte Sellars, 384 S.W.2d 351 (Tex. Ct. Crim. App. 1964); Ex Parte Lewis, 339 S.W.2d 900 (Tex. Ct. Crim. App. 1960), *cert. denied*, 368 U.S. 960. Such hearings are not constitutionally required. *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *United States ex rel Heacock* v. *Myers*, 251 F. Supp. 773 (E.D. Penn. 1966); *Johnson* v. *Tinsley*, 234 F. Supp. 866 (D. Colo. 1964). Irrespective of any other consideration, it would appear that his admitted escape from custody and remaining at large for an extended period

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[21] See: Cochran v. State of Kansas, 316 U.S. 255, 86 L.Ed. 1453 (1942); Hewett v. State of North Carolina, 415 F.2d 1316, 1322 (4th Cir. 1969); Hamrick v. Boles, 231 F. Supp. 507, 510 (N.D. W. Va. 1964).

would constitute a valid basis for the revocation. This point is without merit and is denied.

The record discloses that the order of the Governor of Texas revoking petitioner's parole was dated March 4, 1963. He escaped from the jail in Mississippi within two weeks thereafter, on March 21, 1963. Loper testified, somewhat equivocally, that he demanded a parole revocation hearing while he was in jail in Mississippi. He further testified that when he was arrested in June 1964, over a year later, he stated to the arresting officers that he desired to have a parole hearing. The credibility of Loper is subject to serious doubt. As a matter of fact the district court concluded that he had falsely testified to material facts from time to time. In any even, if it is believed that Loper requested a hearing in accordance with the rules and regulations of the Board, while confined in the Mississippi jail between March 4 and March 21, it would have been impossible to hold such a hearing in view of the fact that Loper was a fugitive from justice from March 21, 1963 until June 1964. In fact we think it is incredible to conclude that he was seeking a hearing before the Texas Board of Pardons and Paroles during the very period in which he was a fugitive, particularly in light of his conduct during this period. The records indicate that he was apprehended in the State of Louisiana while he was an escapee and charged with driving while intoxicated, for which he served a period of 60 days. He was also arrested during the period of escape in Louisiana for carrying a concealed weapon, but these charges were dropped. Texas did not obtain custody of him until the latter part of June 1964. In view of these facts we are unable to conclude that the district court reached an improper conclusion or that Loper has been denied any constitutional right.[22]

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[22] We do not decide the question whether a state may treat out of state parolees in a different manner from those within the state. If we should disregard the particular facts of this case, it could be argued that serious doubts would still remain as to the equal protection argument. A parolee who is granted permission to leave the sentencing state and spend his time on parole in another state, is not in the same situation as those parolees who remain in the sen-

Moreover, the court has received assurances from respondent as well as from the Texas Board of Pardons and Paroles that in all cases where "a parole has been revoked by the Governor, the parolee or his representative may request a hearing before the Board at any time, seeking reinstatement of parole." [22] In accordance with this procedural stipulation by the Parole Board, we reject petitioner's contention that Article 781(b) Tex. Cr. P. and Article 4, Section 11 of the Texas Constitution should be read separately and apart to the end that petitioner is deprived of the equal protection of the Texas law. In-

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tencing state. A state would be at a substantial disadvantage if it could not revoke the parole of a violator beyond its borders without first conducting a hearing. The holding of a revocation hearing in such circumstances could present many practical difficulties involving arrest, custody and similar problems. In certain circumstances it may not be unreasonable to conclude that the sentencing state has a legitimate interest in a rule which permits the revocation of a parole and the apprehension of an alleged parole violator who is beyond its orders without a hearing prior to revocation.

[22] Letter from Pat Bullock, member Texas Board of Pardons and Paroles to Robert Darden, Assistant Attorney General, October 14, 1970. The letter in its entirety reads:

"Dear Mr. Darden:

In response to your question concerning the standard of the Texas Board of Pardons, and Paroles with reference to parole revocations, please be advised that when the Board of Pardons and Paroles of Texas receives a report from a law enforcement officer or a parole officer that a parolee has violated the conditions of his parole, revocation is recommended immediately, pending further investigation, or if the facts presented to the Board are conclusive, revocation is recommended immediately without further investigation. This is standard procedure.

This procedure does not apply when the Governor exercises his constitutional authority to revoke a parole without a recommendation from the Board of Pardons and Paroles.

If a parole has been revoked by the Governor, the parolee or his representative may request a hearing before the Board at any time, seeking reinstatement of parole.

Very truly yours,

/s/Pat Bullock
PAT BULLOCK
Member"

stead, we advert to the fundamental rule of statutory construction that statutes and acts in pari materia should be construed together. Following this rule, Article 4, Section 11 should be construed with reference to, or in connection with Article 781(b) rather than be singled out for independent consideration. We hold, therefore, that Loper may request a hearing before the Board seeking reinstatement of his parole.[24]

Denial of Pre-trial Discovery

Petitioner asserts as his final contention that the district court erred in rejecting his pre-trial requests for Admissions and Written Interrogatories. Petitioner's counsel, in an effort to discover evidence which would be helpful to Loper in his habeaus corpus proceedings, served the state with interrogatories and Request for Admissions of Relevant Facts pursuant to Rule 33 and 36, Fed. R. Civ. P. When the state filed objections on the ground that the Request for Admissions was not authorized in federal habeas corpus proceedings, the court made the following docket entry:

> 8-26-69: Respondent's Motion to Deny Request for Admission and Written Interrogatories is hereby granted. Harris v. Nelson, 394 U.S. 286 (1969).

In *Harris* v. *Nelson*[25] the Supreme Court held that while the discovery provisions of the Federal Rules of Civil Procedure do not apply to habeas corpus proceedings, a "dis-

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[24] There is little doubt in our minds that Loper will be given full consideration by the Board of Pardons and Paroles of the State of Texas. Attached to a pro se brief filed by him in this cause is a letter from the Board dated March 4, 1970, wherein it is stated:

> You know your long record; you know you have been paroled and violated that parole. I don't think you should accept the fact that you will never be paroled again. Your case is set for parole consideration in June, 1971, and it will be carefully evaluated at that time. No one knows now what decision the Board will reach at that time but don't give up hope. Continue your good adjustment and make the best ratings possible.

[25] 394 U.S. 286, 22 L.Ed. 281 (1969), reh. den. 394 U.S. 1025.

trict court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to the disposition of a habeas corpus petition." The court indicated that the nature and extent of permissible discovery is committed to the discretion of the district court, and furnished a general guideline for the courts to follow:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law." [36]

In *the circumstances of this case and considering the full evidentiary hearing afforded* petitioner on each of his contentions, in addition to numerous other court proceedings in which he has attacked his conviction, we are convinced that the trial court did not abuse its discretion in denying the Request for Admissions and Written Interrogatories.[37]

Due process postulates a day in court which means that no one shall be personally bound until he has been afforded a full opportunity to be heard. Beyond that there must be a point at which the legality of confinement

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[36] Id. at 300, (22 L.Ed.2d 291).

[37] See: United States v. Wolfson, 413 F.2d 804, 807 (2d Cir. 1969); Wilson v. Wiegel, 387 F.2d 632 (9th Cir. 1967); Wilson v. Harris, 378 F.2d 141, 142 (9th Cir. 1967); United States v. Wilman, 304 F.2d 53 (5th Cir. 1962); Levy v. Parker, 316 F.Supp. 473 (M.D. Pa. 1970).

is conclusuively and finally determined unless our courts are to bog down completely. With Otis Loper we think that point has been reached and passed.[28]

AFFIRMED.

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[28] We deem it appropriate to state that on this appeal counsel for Loper, appointed by the court, have rendered outstanding service. They have presented his contentions in a clear and cogent manner.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 29235

D. C. Docket No. CA 66-H-657

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 24, 1971

Issued As Mandate:

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* Of the Third Circuit, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29235.

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

(April 26, 1971)

ON PETITION FOR REHEARING

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

---

* Of the Third Circuit, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29235

OTIS LOPER, PETITIONER-APPELLANT

versus

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

(April 26, 1971)

ON PETITION FOR REHEARING

Before GEWIN, MORGAN and ADAMS,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing pro se filed in the above entitled and numbered cause be and the same is hereby DENIED.

SUPREME COURT OF THE UNITED STATES

No. 70-5388

OTIS LOPER, PETITIONER

v.

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition which reads as follows:

"Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?"

October 12, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

v.

GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
QUESTION PRESENTED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 4
ARGUMENT 5
CONCLUSION 17

TABLE OF CITATIONS

Cases:

Aresnault v. Massachusetts, 393 U.S. 5 (1968) 12, 14
Ballard v. Howard, 403 F.2d 653 (6th Cir. 1968) 16
Bates v. Nelson, 393 U.S. 16 (1968) 14
Betts v. Brady, 316 U.S. 455 (1942) 9
Burgett v. State of Texas, 389 U.S. 109 (1967) . . . . . *passim*
Carnley v. Cochran, 369 U.S. 506 (1962) 8
Chapman v. California, 386 U.S. 18 (1967) 7, 14
Desist v. United States, 394 U.S. 244 (1969) 14
Doughty v. Maxwell, 376 U.S. 202 (1964) 10
Fahy v. Connecticut, 375 U.S. 85 (1963) 15
Gideon v. Wainwright, 372 U.S. 335 (1963) 4, 5, 9
Gilday v. Scafati, 428 F.2d 1027 (9th Cir. 1970), cert. denied 400 U.S. 926 (1970) 9-12, 14, 15
Greer v. Beto, 384 U.S. 269 (1966) 6
Griffin v. California, 380 U.S. 609 (1965) 13
Harrington v. State, 395 U.S. 250 (1969) 16
In Re Dabney, 76 Cal. Rptr. 636, 452 P.2d 924 (1969) 14
Johnson v. State, 9 Md. App. 166, 263 A.2d 232 (Md. 1970) 11, 14
Linkletter v. Walker, 381 U.S. 618 (1965) 10

Losieau v. Sigler, 406 F.2d 795 (8th Cir. 1969) cert. denied, 396 U.S. 988 (1969) 8, 14

Oswald v. Crouse, 420 F.2d 373 (10th Cir. 1969) 14

People v. Coffey, 60 Cal. Rptr. 457, 430 P.2d 15 (1967) 10, 14

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) 10

Roberts v. Russell, 392 U.S. 293 (1968) 14

Simmons v. State, 456 S.W.2d 66 (Tex. Crim. App., 1970) 14

Spaulding v. State, 481 P.2d 389 (Alaska Sup. Ct. 1971) 10, 14

Spencer v. Texas, 385 U.S. 554 (1967) 11, 12

Stovall v. Denno, 388 U.S. 293 (1967) 10

Subilosky v. Commonwealth, 265 N.E.2d 80 (Mass. Sup. Jud. Ct. 1970) 14

Tucker v. Craven, 421 F.2d 139 (9th Cir. 1970) 12, 14

Tucker v. United States, 431 F.2d 1292 (1970), cert. granted 402 U.S. 942 (May 3, 1971) 9, 21, 14

United States ex. rel. Esterling v. Wilkins, 303 F.2d 883 (2nd Cir. 1962) 8

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968) 8, 14

Statutes:

28 U.S.C. § 1254(1) 2

Miscellaneous:

McCormick, Evidence § 43, p. 93 (1954) 11

3A Wigmore, Evidence § 890, n. 1 (Chadbourne rev. 1970) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5388

OTIS LOPER,

Petitioner,

v.

GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion and judgment of the United States District Court for the Southern District of Texas, Houston Division, is not reported and may be found in the Appendix ("App.") at pages 59-65. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 440 F.2d 934 (1971) (App. 67-83).

JURISDICTION

Jurisdiction of this Court to review the judgment in question is based upon Section 1254 (1) of the Judicial Code.

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered March 24, 1971 (App. 84). A timely petition for rehearing and petition for rehearing pro se were denied by orders of the Court of Appeals entered April 26, 1971 (App. 85-86).

A petition for writ of certiorari was filed on June 21, 1971 and was granted October 12, 1971, limited to consideration of the question hereinafter stated (App. 87).

QUESTION PRESENTED

Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?

STATEMENT OF THE CASE

Loper was arrested on August 9, 1947 and indicted on the charge of statutory rape of his eight-year-old step-daughter. At Loper's trial on November 17, 1947 in the District Court of Harris County, Texas, only two witnesses testified on the issue of the commission of the crime by Loper, one for the prosecution and one for the defense. The state relied solely upon the testimony of the eight-year-old victim of the rape to identify Loper as the violator (App. 24-25). The only testimony used by the defense was that of the petitioner himself. Taking the stand in his own defense, Loper testified that he had not committed the crime (App. 42, 46, 49-50).

During cross-examination by the state, Loper's testimony was impeached by the state through the use of four prior felony convictions obtained in the States of Mississippi and Tennessee. Over defense counsel's objections on grounds of

remoteness in time and prejudicial effect upon the jury (App. 47-48), the State elicited from Loper the details of prior convictions for burglary occurring in 1940 in Carthage, Mississippi, for which Loper was sentenced to five years imprisonment; in 1935 in Petros, Tennessee, resulting in a four year sentence; and in 1931 in Parchman, Mississippi, for which Loper, then seventeen years of age, was sentenced to six months imprisonment (App. 47-48). The state also brought forth that Loper had been tried and convicted of burglary in Mississippi in 1932 under the name Milton Cummings, and had been sentenced to two years imprisonment for that offense (App. 48-49). Loper was found guilty of the offense by the jury and on November 20, 1947, was sentenced to 50 years in the state penitentiary.

At the trial of his petition for writ of habeas corpus in the United States District Court, Loper testified regarding the circumstances surrounding the prior convictions. In essence he testified that he was not represented by counsel, did not know and was not advised of his right to counsel, and did not inform the court that he did not desire counsel (App. 15-16). Loper also introduced court records to corroborate his testimony. A certified copy of the sentence from the 1940 conviction recites appearance at the trial by the prosecutor and by "the defendant in his own proper person" (Pl. Ex. 8, App. 52). Certified copies of the indictment and judgment in the 1935 conviction also recite appearance by the prosecutor "and the defendant in person" (Pl. Ex. 9, App. 55). Certified copies of the indictment, judgment and sentence introduced regarding the 1931 conviction are silent regarding the presence or absence of counsel (Pl. Ex. 10, App. 56-58). No evidence has been introduced by the State which could rebut or contradict the testimony of Loper or the matters relfected upon the face of these records.

The United States District Court for the Southern District of Texas in an unreported Memorandum Opinion and Decision denied Loper's claim that introduction of the prior convictions at the 1947 trial resulted in a denial of his constitutional right to a fair and impartial trial (App. 59 at pp.

62-63). The United States Court of Appeals for the Fifth Circuit affirmed (App. 67 at p. 69-71), holding that the circumstances involved did not bring Loper within the scope of the Court's decision in *Burgett v. State of Texas*, 389 U.S. 109 (1967).

On September 1, 1971, Loper was granted parole by the members of the Texas Board of Pardons and Paroles, and is presently at liberty in the legal custody of the Texas Department of Corrections. Upon motion and by order of the Court entered November 16, 1971, the members of the parole board were joined in this cause as parties respondent.

SUMMARY OF ARGUMENT

The evidence introduced with respect to the prior felony convictions used for impeachment at Loper's 1947 state court trial raised a presumption that Loper had been denied the right to counsel and that the convictions were therefore void under *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Burgett v. State of Texas*, 389 U.S. 109 (1967), involved an attempted use of prior void convictions for enhancement of punishment upon conviction of the primary offense. The attempt failed, however, and the trial court instructed the jury not to consider the prior convictions for any purpose. In reversing the resulting conviction, this Court firmly established the constitutional principle that prior uncounseled convictions may not be used "either to support guilt or enhance punishment . . . for another offense," since such use would result in the defendant suffering anew from the earlier deprivation of the right to counsel secured to him by the Sixth Amendment to the Constitution.

The rationale of this Court's decision in *Burgett* encompasses introduction by the State of prior void convictions for the purpose of impeaching Loper who took the stand at his 1947 trial to testify in his own defense. Evidence which is introduced to impeach testimonial credibility has the obvious purpose of causing the trier of fact to believe such testimony is unreliable because of character of the

witness. Where such impeachment evidence is used against a defendant taking the stand to testify in his own behalf, the necessary effect of such impeachment evidence is "to support guilt" by discrediting the defendant's testimony to the contrary, and is therefore prohibited under the doctrine established in *Burgett* where the impeachment evidence so used is tainted by the constitutional infirmity inhering in the uncounseled convictions.

The constitutional safeguards of *Burgett* have been retroactively applied by the federal courts in conformity with the precepts for such determination established by this Court. Although the effect of such evidence was referred to in *Burgett* as "inherently prejudicial," courts have considered and applied the harmless error doctrine where challenges to prior convictions have been raised in reliance upon that case. Here the substance and nature of the testimony presented at Loper's state court trial rendered critical the issue of credibility of the witnesses and the weight to be given to their testimony. The issue of guilt resolved itself into one of whether the jury would believe the testimony of the eight-year-old child or that of Loper. That the jury did not credit Loper's testimony is obvious from the resulting conviction, and it is not only "reasonably possible" but probable that the invalid impeachment evidence was a factor leading to their determination of guilt. Under such circumstances, the unfairness and prejudicial effect inherent in the State's use of prior void convictions to impeach Loper's credibility could not be considered harmless error.

ARGUMENT

The principle of *Burgett v. State of Texas*, 389 U.S. 109 (1967), is that to permit a conviction obtained without the assistance or valid waiver of counsel and therefore void under *Gideon v. Wainwright*, 372 U.S. 335 (1963), to be used against a person either to support guilt or enhance punishment for another offense is to cause such person to

suffer anew a violation of the right to counsel guaranteed by the Sixth Amendment of the Constitution and made applicable to the states by the Fourteenth Amendment. The issue here squarely presented is whether the rationale of this Court's decision in *Burgett* is applicable to the use of prior void convictions for impeachment purposes in circumstances where such use may have influenced the jury verdict.

In *Burgett*, the indictment of the defendant, in addition to allegations upon the primary substantive count, contained counts under the Texas Recidivist statute reciting three prior Tennessee convictions and one prior Texas conviction. During the course of the trial and in the presence of the jury, the trial court allowed evidence to be introduced in support of one of the Tennessee convictions contained in the recidivist counts. The state thereafter failed by proper proof to establish the recidivist counts, and the case went to the jury only upon issues concerning the primary substantive violation. Upon the failure of proof, the trial court specifically instructed the jury not to consider the prior convictions for any purpose. The defendant was convicted upon the primary offense and was sentenced to 10 years imprisonment. The Texas Court of Criminal Appeals affirmed on the basis that there had been no enhanced punishment and no error in introducing the priors because of the trial court's instruction to the jury. On appeal of the resulting conviction, this Court held that the certified records introduced rendered the prior Tennessee conviction presumptively void. In considering the further question of whether presentation of such evidence to the jury under the above circumstances required reversal of the conviction, even though the defendant's sentence had not been enhanced as a result of the recidivist count, this Court held:

> "To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269,

> 16 L. ed. 2d 526, 86 S. Ct. 1447) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at page 115.

The Fifth Circuit Court of Appeals in facing the similar question—void convictions used for the purpose of impeachment—refused to apply the principles of *Burgett* holding in effect that use of prior, void convictions for impeachment, rather than enhancement, is not proscribed by *Burgett* or that even if it is, such use in Loper's case was "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18 (1967). After commenting upon Loper's "heavy reliance" upon the rationale of *Burgett*, the Court of Appeals states:

> "By analogy [Loper] argues that the same rule should apply to the use of such former convictions for the purpose of impeachment. We decline to extend the teachings of Burgett to the situation here presented. * * * Except for the assertions of Loper the record fails to furnish any conclusive information as to the facts and circumstances surrounding his former convictions. * * * Furthermore, it is obvious to us that the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant." 440 F.2d at page 937 (App. 70).

In refusing relief because the record failed to furnish any "conclusive information" as to the facts and circumstances surrounding the former convictions, the Court of Appeals has disregarded evidence introduced by Loper which is almost precisely the same as that considered in *Burgett*. In addition to the testimony of Loper that he did not have and made no valid waiver of his right to counsel, corroborative evidence was introduced consisting of certified records

of the prior convictions in 1940 and 1935, respectively, which recited appearance by "the defendant in his own proper person" and by "the defendant in person." The certified records of the prior conviction in 1931 is silent as to the presence or absence of counsel. The State brought forth no countervailing evidence with respect to the proceedings at the prior convictions, and the evidence thus introduced stands uncontradicted in the record. The evidence presented is the same as that considered in *Burgett* where certified records of the prior Tennessee conviction admitted by the trial court stated that the petitioner had appeared "in proper person." The determination of this Court with respect to the effect of such evidence of prior convictions is clear:

> "In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506, 8 L. ed. 2d 70, 82 S. Ct. 884." 389 U.S. at page 114-15.

The evidence introduced by Loper rendered the prior convictions presumptively void, and shifted the burden to the state to produce evidence that such proceedings, under the mandate of *Gideon* retroactively applied, were not fundamentally unfair. *Losieau v. Sigler,* 406 F.2d 795 (8 Cir., 1969) cert. denied, 396 U.S. 988 (1969); *Williams v. Coiner,* 392 F.2d 210 (4 Cir. 1968). See also United States ex rel. *Esterling v. Wilkins,* 303 F.2d 883 (2 Cir., 1962). Since the State did not produce any evidence upon this issue, the prior convictions used to impeach Loper are presumptively void.

The basic issue here presented is whether *Burgett* prohibits use of prior invalid convictions for impeachment purposes. The Court of Appeals for the Fifth Circuit declined to adopt this interpretation, basing its decision in part upon the ground that use of such convictions to

impeach credibility "is not nearly so serious" as their use to enhance punishment which may add years of imprisonment to the resulting sentence. 440 F.2d at page 937. In so doing the Court of Appeals has placed unwarranted focus upon the possible result, in terms of length of imprisonment if conviction is obtained, as opposed to the possible effect upon the constitutional rights of the defendant and the fairness of the trial by use of such evidence to obtain a conviction. No valid basis for drawing such a distinction can be perceived from an analysis of the constitutional precept involved. Manifestly, whether the prior void convictions are introduced to enhance or impeach and regardless of the term of sentence involved, the result has been that the defendant has suffered anew from proceedings infected by the unconstitutional deprivation of counsel. The conclusion by the Fifth Circuit in this regard is contrary to that of other Courts of Appeals which have interpreted the proscription of *Burgett* to include not only prior void convictions used for enhancement but those used to impeach credibility as well. See *Gilday v. Scafati*, 428 F.2d 1027 (1 Cir., 1970), cert. denied, 400 U.S. 926 (1970); *Tucker v. United States*, 431 F.2d 1292 (9 Cir., 1970), cert. granted, 402 U.S. 942 (May 3, 1971).

The circumstances involved and opinion of the Court leave little doubt that *Burgett*, although it involved facts which brought before the jury prior void convictions in the context of enhancement, includes within the scope of its proscription the use of prior void convictions for the purpose of impeaching credibility as well. *Burgett* was decided upon the same constitutional principles underlying this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Overruling *Betts v. Brady*, 316 U.S. 455 (1942), the Court in *Gideon* held that the right to counsel guaranteed by the Sixth Amendment was applicable to the states by virtue of the Fourteenth Amendment and that it was a violation of rights secured by the Federal Constitution to try a person in state court absent legal representation or a valid waiver thereof. The decision has been given retro-

active application. *Burgett v. Texas*, supra, 389 U.S. at 114; *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). Implicit in *Gideon* is that denial of counsel in a criminal trial necessarily invalidates the conviction because lack of counsel so jeopardizes the fairness of the trial that any finding of guilt is likely to be unreliable. *Linkletter v. Walker*, 381 U.S. 618, 639 (1965); *Stovall v. Denno*, 388 U.S. 293, 297-98 (1967). Accordingly, where the defendant has suffered a violation of his constitutionally guaranteed right to counsel, *Burgett* mandates that the defendant must not thereafter be made to suffer anew from such violation. Because of the unreliability of uncounseled convictions, their use in any subsequent criminal proceeding simply compounds the original denial of the right to counsel secured by the Constitution. *Gilday v. Scafati*, supra, 428 F.2d at page 1029; *Spaulding v. State*, 481 P.2d 389, 392 (Alaska Sup. Ct., 1971). The defect in the proceedings which resulted in the uncounseled conviction presents an infirmity that infects use of such conviction thereafter for any purpose. *People v. Coffey*, 60 Cal. Rptr. 457, 430 P.2d 15, 25 (1967).

The Court in *Burgett* did not limit its holding and opinion to the context of enhanced punishment, but took a broader view in holding that the use of prior convictions, void under *Gideon*, against the defendant "either *to support guilt* or enhance punishment *for another offense*" is to erode the principle of that case. 389 U.S. at page 115 (emphasis added). In fact, the decision in *Burgett* is itself inconsistent with the limitation of its constitutional principles to enhancement situations. There, although the prior void convictions were initially admitted in support of the recidivist count, they were later withdrawn and the jury instructed not to consider them for any purpose. They no longer had any enhancement potential and, notwithstanding the trial court's instruction to disregard them for all purposes, this Court held that they so tainted the trial as to render the resulting conviction constitutionally infirm. That infirmity is even more apparent in Loper's case, for the

prior void convictions were admitted over objection for the purpose of causing the jury to disbelieve Loper and thus convict him. Their effect "to support guilt" was certainly stronger than that condemned by the Court in *Burgett*.

Other considerations compel that the constitutional principles embodied in *Burgett* apply with equal force where use of the void convictions is for impeachment purposes. The purpose of impeachment by prior convictions is to cast doubt upon the truthfulness of the impeached witness. The prosecutor utilizes such evidence of prior convictions with the expectation that the jury will discredit the testimony of the impeached witness as unreliable because of the witness's prior criminal conduct. The credibility of an accused testifying in his own behalf is material to his guilt or innocence. *Gilday v. Scafati*, 428 F.2d 1027, 1029 (9 Cir., 1970); *Johnson v. State*, 9 Md. App. 166, 263 A.2d 232, 239 (1970). The prejudicial effect of such impeaching evidence has been heretofore "conceded" by this Court. *Spencer v. Texas*, 385 U.S. 554, 561 (1967).[1] Thus, use of prior convictions to impeach Loper's credibility was "to support guilt" of the offense for which he was on trial. Since the impeaching evidence was unreliable because of the constitutional infirmity inhering in the underlying uncounseled convictions, the same unreliability exists in any

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[1]The situation is accurately characterized in McCormick, Evidence §43, p. 93 (1954). "The sharpest and most prejudicial impact of the practice of impeachment by conviction * * * is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are for crimes similar to the one on trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility."

conclusion of untruthfulness which might have been drawn by the jury therefrom. *Gilday v. Scafati*, supra, 428 F.2d at page 1029. The record reflects no admonition or limiting instruction by the court to the jury, as in *Burgett*, not to consider the prior convictions for any purpose, or even the customary instruction not to consider such prior convictions for the purpose of determining guilt or innocence upon the offense alleged in the indictment. *Spencer v. Texas*, supra, 385 U.S. at page 558. Most important, in the absence of enhanced punishment, admission of the prior convictions had no effect other than that the jury's awareness of such prior void conviction might have affected its decision upon the substantive charge, which is precisely the situation if such prior void convictions had been used in *Burgett* solely for the purpose of impeachment. See *Tucker v. Craven*, 421 F.2d 139 (9 Cir., 1970) cert. denied, 398 U.S. 929 (1970) (introduction of invalid priors in enhancement context taints conviction on primary offense); compare *Arsenault v. Massachusetts*, 393 U.S. 5 (1969) (impeachment by guilty plea entered at preliminary hearing when accused not represented by counsel required reversal of resulting conviction). This is not foreclosed by this Court's decision in *Spencer*, supra, since that decision did not involve consideration of constitutionally infirm prior convictions. The prejudicial effect of having evidence of prior convictions before the jury at the guilt determination stage of trial there acknowledged and allowed because of the valid state interest involved and limited procedural safeguards afforded cannot be justified where the prior convictions utilized for impeachment were obtained in violation of Loper's "specific federal right" to assistance of counsel.

The decision of the Fifth Circuit Court of Appeals in this case is in direct conflict with the conclusions regarding applicability of *Burgett* reached by the United States Courts of Appeals for the First and Ninth Circuits in *Gilday v. Scafati*, 428 F.2d 1027 (1970), cert. denied, 400 U.S. 926 (1970), and *Tucker v. United States*, 431 F.2d 1292 (1970), cert. granted, 402 U.S. 942 (May 3, 1971). In *Gilday*, Peti-

tioner was tried and convicted of armed robbery in March 1964 and sentenced to a term of imprisonment of 15 to 25 years. During the trial, the petitioner took the stand to testify in his own behalf and the prosecutor was allowed upon cross examination to offer evidence of five prior convictions to impeach petitioner's credibility. Three of the convictions were the result of trials where petitioner neither had nor validly waived the assistance of counsel. With respect to the scope of *Burgett* and its inclusion of prior convictions used for impeachment, the Court of Appeals held:

> "'We conclude that the Burgett rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,' for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use 'to prove guilt or enhance punishment.' Finally, defendant's privilege to testify or not to testify—Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be admitted. We therefore hold that Burgett prevents the use of uncounseled convictions for purposes of impeachment." 428 F.2d at page 1029.

The Court of Appeals went on to conclude, however, that under the facts presented by the record, the reception of evidence pertaining to the invalid convictions was harmless error. Upon substantially the same facts, the same result and conclusion was reached by the Ninth Circuit in *Tucker*

v. United States, supra.[2] That *Burgett* includes within its scope prior void convictions used for impeachment has also been determined by state courts which have considered the issue. *Johnson v. State*, 9 Md. App. 166, 263 A.2d 232 (1970); *Spaulding v. State*, 481 P.2d 389 (Alaska Sup. Ct. 1971); *In re Dabney*, 76 Cal. Rptr. 636, 452 P.2d 924 (1969). Compare *Simmons v. State*, 456 S.W.2d 56 (Tex. Crim. App., 1970). See also *Subilosky v. Commonwealth*, 265 N.E.2d 80 (Mass. Sup. Jud. Ct., 1970); *People v. Coffey*, 60 Cal. Rptr. 457, 430 P.2d 15 (1967).

The constitutional safeguards established in *Burgett* have been applied retroactively by the courts in *Gilday* and *Tucker*, and by other federal courts, *Tucker v. Craven*, 421 F.2d 139 (9 Cir., 1970), cert. denied, 398 U.S. 929 (1970); *Losieau v. Sigler*, 406 F.2d 795 (8 Cir., 1969), cert. denied, 396 U.S. 988 (1969); *Oswald v. Crouse*, 420 F.2d 373 (10 Cir., 1969); *Williams v. Coiner*, 392 F.2d 210 (4 Cir., 1968), in conformity with the principles for retroactive application established by the Court. *Desist v. United States*, 394 U.S. 244, 249 (1969); *Roberts v. Russell*, 392 U.S. 293 (1969); see also *Bates v. Nelson*, 393 U.S. 16 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5 (1969). Review has also included, however, consideration of whether the introduction of such evidence at the trial was "harmless error" under the doctrine established by this Court in *Chapman v. California*, 386 U.S. 18 (1967). The Fifth Circuit Court of Appeals in this case

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[2]In *Tucker*, the prior void convictions were introduced not only to impeach credibility but additionally to assist the court in fixing sentence. Tucker had received the maximum sentence of 25 years for the offense involved. The Ninth Circuit concluded that there was a "reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence," 431 F.2d at page 1294, and remanded the cause for resentencing without consideration of the invalid priors. Certiorari to review this decision has been granted, 402 U.S. 942 (1971).

sought to support its determination by reference to *Chapman*, concluding in effect that the error, if any, in admitting the prior void convictions was harmless. The Court of Appeals failed, however, to treat the evidence of record or otherwise set forth any basis upon which it might have reached this conclusion. In *Burgett*, the Court referred to *Chapman*, noting that the admission of a prior criminal conviction which is constitutionally infirm is "inherently prejudicial." Although this accords with its further holding that instructions by the court to the jury not to consider the prior conviction for any purpose did not cure the error, it is not clear whether the Court meant to establish a "per se" violation by this reference, and the language has been construed as not having that effect. See *Gilday v. Scafati*, supra, 428 F.2d at page 1030. The criticisms which have been leveled at existing practices of impeachment by concededly admissible evidence of prior convictions lends much support to application of a per se rule where the evidence used is tainted. See authorities collected in 3A Wigmore, Evidence § 390, n. 1 (Chadbourne rev. 1970). Even if it is assumed that the harmless error doctrine of *Chapman* applies, the standard set forth can have no application under the facts presented by the record before this Court. In *Chapman*, the Court articulated the standard as follows:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' * * * We, therefore, do no more than adhere to the meaning of our Fahy Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at pp. 23-24.

Thus, if there is a "reasonable possibility" that the constitutional error was one which influenced the jury adversely to the litigant, it cannot be harmless. The effect which

introduction of the invalid priors in Loper's 1947 trial had can be measured by reference to the transcript of those proceedings set forth at length in the Appendix (App. pp. 19-51). The transcript is not one reflecting evidence "so overwhelming" that Loper committed the offense that the violation of *Burgett* was harmless error. *Harrington v. State*, 395 U.S. 250 (1969). The issue of whether the offense was committed and by whom was sharply disputed. The only evidence introduced to establish Loper as the violator was that of the eight-year-old victim. Compare *Ballard v. Howard*, 403 F.2d 653 (6 Cir., 1968). Taking the stand in his own defense, Loper's testimony denying complicity was impeached upon cross examination by the state by introduction into evidence of the prior void convictions. The details as to nature of the offense involved, date and term of imprisonment were carefully elicited (App. 47-49), and reference was again made by the State to the four prior felony convictions upon subsequent examination (App. 50). The issue of guilt was reduced to consideration by the jury of whose testimony was to be credited—that of the young girl who identified Loper as the violator or that of Loper claiming innocence of the charge. It is manifest that the jury resolved the issue of credibility adversely to Loper in convicting him of the offense. One of Loper's court-appointed attorneys at the 1947 trial, L. D. Harris, testified at the hearing in the district court that he believed at the time that the prosecution's case was constructed on "very flimsy evidence" (App. 18). Under these circumstances, a case constructed solely on such uncorroborated testimony and impeachment of the testimonial credibility of Loper, the prejudicial error in admission to the jury of the constitutionally infirm prior convictions could not possibly be "harmless beyond a reasonable doubt."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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November 14, 1971

LOPER *v.* BETO, CORRECTIONS DIRECTOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–5388. Argued January 13, 1972—Decided March 22, 1972

For the purpose of impeaching petitioner's credibility, the prosecutor in petitioner's 1947 rape trial was permitted to interrogate him about his previous criminal record. Petitioner admitted four felony convictions during the period 1931–1940. He was found guilty by the jury and was sentenced to a term of 50 years. He filed a petition for habeas corpus in Federal District Court alleging that the previous convictions were constitutionally invalid under *Gideon* v. *Wainwright*, 372 U. S. 335, because he had been denied the assistance of counsel. The District Court denied relief and the Court of Appeals affirmed, stating that the "fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal." *Held:* The judgment is vacated and the case is remanded to the Court of Appeals for further proceedings. Pp. 480–485.

440 F. 2d 934, vacated and remanded.

MR. JUSTICE STEWART, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that the use of convictions constitutionally invalid under *Gideon* v. *Wainwright*, *supra*, to impeach a defendant's credibility deprives him of due process of law. Pp. 480–483.

MR. JUSTICE WHITE concluded that although the Court of Appeals erred, on remand that court does not necessarily have to set petitioner's conviction aside. There remain unresolved issues: whether petitioner was represented by counsel at his earlier trials and, if not, whether he waived counsel; and the possibility of a finding of harmless error, all of which should be considered in the first instance by the lower court. P. 485.

STEWART, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 485. BURGER, C. J., filed a dissenting opinion, in which POWELL, J., joined,

post, p. 485. BLACKMUN, J., filed a dissenting opinion, *post*, p. 494. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined, *post*, p. 497.

John T. Cabaniss, by appointment of the Court, 404 U. S. 954, argued the cause for petitioner. With him on the brief was *Dan G. Matthews*.

Robert Darden, Assistant Attorney General of Texas, argued the cause for respondents. With him on the brief were *Crawford C. Martin*, Attorney General, *Nola White*, First Assistant Attorney General, *Alfred Walker*, Executive Assistant Attorney General, and *Robert C. Flowers*, Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old stepdaughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931–1940, three in Mississippi and one in Tennessee.[1]

[1] "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

"A. About twice in the past ten years.

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

[*Footnote 1 continued on p. 475*]

At the conclusion of the one-day trial the jury found Loper guilty as charged and sentenced him to a term of 50 years in prison.

"THE COURT: Well, let him finish the question, Mr. Letts.

"Q. All right, On May 7th, 1940, what were you indicted and convicted for?

"A. Burglary.

"Q. Where was that?

"A. Carthage, Mississippi.

"Q. What did you get for that?

"A. Five years in the penitentiary.

"Q. On January 15th, 1935, what were you indicted and convicted for then?

"A. Burglary.

"MR. LETTS: We object, your honor, as that has been over ten years.

. . . .

"Q. What were you indicted, tried and convicted for then on January 15th, 1935, in Brushy Mountain Parish, Pettos, Tennessee?

"A. Burglary.

"Q. What did you get for that?

"A. Four years.

"Q. How about October 27th, 1931, what . . .

"MR. LETTS: Your honor, we object to that and ask the Court to instruct the jury not to consider it. That reaches way back to 1931 and the Court knows it would prejudice and inflame the minds of the jury in this case.

"THE COURT: Objection over-ruled.

. . . .

"Q. Where were you arrested on November 29th, 1934?

"A. In Chattanooga, Tennessee.

"Q. What about October 27th, 1931, what were you convicted for in Parchman, Mississippi, then?

"A. Burglary.

"Q. What did you get for that?

"A. Six months, I think.

"Q. There have been so many offenses you have committed that you can't remember them straight, can you?

"MR. LETTS: We object to that remark, your honor.

"THE COURT: Objection sustained.

[*Footnote 1 continued on p. 476*]

Loper initiated the present habeas corpus proceeding in the United States District Court for the Southern District of Texas in 1969. He alleged, among other things, that the previous convictions used to impeach his credibility at the trial were constitutionally invalid under *Gideon* v. *Wainwright*, 372 U. S. 335, because he had been denied the assistance of counsel in the Mississippi and Tennessee courts that had convicted him.[2]

"Q. It was for burglary in 1931?
"A. Yes.
"Q. Have you always gone by the name of Otis Loper?
"A. Not always.
"Q. What other names have you gone by?
"A. Milton Cummings.
"Q. That was in Mississippi, wasn't it?
"A. Yes sir.
"Q. What were you indicted and tried for on that case in Mississippi in 1932?
"A. Burglary.
"Q. How much time did you get on that conviction?
"A. Two years.
"Q. And that was under the name of Milton Cummings?
"A. Yes.
"Q. And that is 4 times that you have been convicted of burglary, a felony?
"A. Yes.
"MR. DUGGAN: That's all, no more questions."

[2] Loper's petition was originally dismissed by the District Court, but the Court of Appeals vacated the dismissal and remanded for an evidentiary hearing on the question whether Loper had been deprived of his right to appeal from the Texas judgment of conviction. 383 F. 2d 400. On remand, the District Judge, noting that Loper had filed numerous habeas corpus petitions over a period of 20 years, appointed counsel to represent Loper and directed him to raise any points that "conceivably might be raised in his behalf," in order that a single evidentiary hearing could serve to put an end to postconviction litigation in Loper's case. Loper, with the assistance of counsel, then advanced six claims, and the evidentiary hearing was directed to resolving all six contentions. The claim at issue here had not been raised in any of Loper's previous petitions.

His sworn testimony at the habeas corpus hearing confirmed these allegations.[3] In addition, he produced court

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[3] "Q. Were you convicted in 1931 of burglary in Scott County, Mississippi?

"A. Yes, sir.

"Q. How old were you at this time?

"A. I don't remember, but I believe I was around 17 years, something around that age. I'm not for sure.

"Q. Were you represented by an attorney in connection with that proceeding?

"A. No, sir, I didn't have an attorney.

"Q. Were you advised that you had a right to an attorney whether you could afford one or not?

"A. No, sir.

"Q. Did you know that you were entitled to one whether you could afford one or not?

"A. No, sir.

"Q. Did you inform the court that you did not want to be represented by an attorney?

"A. No, sir.

"Q. Were you convicted in that proceeding?

"A. Yes, sir.

"Q. Were you convicted, Mr. Loper, of burglary in 1940 in Leake County, Mississippi?

"A. Yes, sir.

"Q. How old were you at the time that occurred?

"A. I believe I was about 25 or 26, I don't remember for sure.

"Q. Let me ask you one more question about that Scott County, Mississippi, conviction. Did you plead guilty or not guilty?

"A. I plead guilty.

"Q. Were you sentenced to a term in prison?

"A. Yes, sir.

"Q. All right, sir. Now, in connection with the 1940 conviction, were you represented by an attorney?

"A. No, sir.

"Q. At any stage of the proceedings?

"A. No, sir.

"Q. Were you advised that you had a right to an attorney whether you could afford one or not?

[*Footnote 3 continued on p. 478*]

records to corroborate this testimony.[4] The District Court denied habeas corpus relief, placing "little or no credence" in Loper's testimony, and holding that in any event "the question does not rise to constitutional stature and is not subject to collateral attack."[5]

On appeal, the Court of Appeals for the Fifth Circuit

"A. No, sir.

"Q. Could you in fact afford one?

"A. I don't believe I could have then.

"Q. What about 1931, the conviction in Scott County, Mississippi, could you have afforded an attorney?

"A. I couldn't have, no, sir.

"Q. Did you know in connection with the 1940 proceeding that you were entitled to be represented by counsel whether you could afford it or not?

"A. No, sir.

"Q. Did you inform the court that you did not want to be represented by an attorney?

"A. No, sir.

"Q. Was the 1940 proceeding in Leake County, Mississippi, did you plead guilty or not guilty?

"A. Not guilty.

"Q. Was a trial held?

"A. Yes, sir.

"Q. Who conducted the defense in that trial?

"A. Well, there wasn't anybody. I just didn't know what to ask the people. I didn't know anything about how to.

"Q. Did you conduct your own trial?

"A. As far as it was conducted, yes, sir.

"Q. Why did you attempt to do so yourself?

"A. Well, I didn't have an attorney, and nobody to help me. I didn't want to plead guilty to it."

[4] A certified record of the 1940 proceeding in Leake County, Mississippi, recited that Loper appeared "in his own proper person." A certified copy of the 1935 proceeding in Hamilton County, Tennessee, recited that Loper appeared "in person." A certified copy of the 1931 proceeding in Scott County, Mississippi, recited simply that Loper and his codefendants "entered pleas of guilty, as charged in the indictment." No record was introduced of the 1932 conviction in Mississippi.

[5] The memorandum and order of the District Court are unreported.

affirmed the judgment of the District Court. Although recognizing "the force of Loper's argument to the effect that such convictions may have impaired his credibility in the minds of the jury as a witness in his own behalf," the appellate court held that "the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant. . . . The issue presented raises an evidentiary question. The fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal." 440 F. 2d 934, 937.[6]

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[6] A dissenting opinion, *post*, at 502, implies that the District Court found that the petitioner did not meet his burden of proving that he had not waived his right to counsel in the Mississippi and Tennessee courts. But no such finding appears in the record. The District Court did say that "there is no evidence other than petitioner's own statement *that he was not represented by counsel* at the time of his prior convictions, which evidence, as stated above, I decline to accept as credible." (Emphasis added.) This statement is wholly incorrect, for Loper did introduce documentary evidence to corroborate his testimony that he had not been represented by counsel on at least two of his prior convictions. See n. 4, *supra*. Nowhere in the District Court's opinion is there any finding of fact as to whether Loper might have *waived* counsel. And the fact that the challenged convictions occurred at a time when, under our decisions, state courts were under no constitutional obligation to provide lawyers to indigent defendants in all felony cases, would make any such finding highly unrealistic, in the face of the documentary evidence and the petitioner's uncontradicted testimony. For, at the time of the petitioner's previous convictions, there was no known constitutional right to be "waived."

Moreover, the judgment that we review today is not that of the District Court, but of the Court of Appeals. That court stated:

"The convictions mentioned have been of record for a number of years, yet the record before us does not disclose that any attack has ever been made upon those convictions. Except for the assertions of Loper the record fails to furnish any conclusive information

We limited our grant of certiorari to a single constitutional question, worded as follows in the petition for certiorari: Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case? 404 U. S. 821. This is a recurring question that has received conflicting answers in the United States Courts of Appeals.[7] It is a question that has also divided state appellate courts.[8]

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as to the facts and circumstances surrounding his former convictions. So far as the record before us reveals, there are outstanding, unchallenged, state court convictions of felonies in the States of Mississippi and Tennessee. . . . [I]f the convictions possessed the infirmities which Loper claims, he has failed to make any effort to set them aside for over 30 years. No one else could have done so. Surely such an attack was available to him in view of the retroactive application of the *Gideon* decision which was decided over six years prior to the hearing under review." 440 F. 2d, at 937.

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the District Court quoted above, did not rest its decision on a finding that the petitioner had failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. See *Burgett* v. *Texas*, 389 U. S. 109, 114–115; *Loniecu* v. *Sigler*, 406 F. 2d 795, 803; *Williams* v. *Coiner*, 392 F. 2d 210, 212–213.

The dissenting opinion relies upon our decision last Term in *Kitchens* v. *Smith*, 401 U. S. 847. Yet we held in that case that the petitioner on collateral review had sufficiently "proved he was without counsel due to indigency at the time of his [1944] conviction," even though, unlike the present case, the petitioner "introduced no evidence other than his own testimony." *Id.*, at 849.

[7] Compare the decisions in this case and in *Walker* v. *Follette*, 443 F. 2d 167 (CA2 1971), with *Gilday* v. *Scafati*, 428 F. 2d 1027 (CA1 1970); *Tucker* v. *United States*, 431 F. 2d 1292 (CA9 1970); and *Howard* v. *Craven*, 446 F. 2d 586 (CA9 1971).

[8] *Simmons* v. *State*, 456 S. W. 2d 66 (Ct. Crim. App. Tex. 1970), holds that prior convictions obtained without the benefit of counsel

The starting point in considering this question is, of course, *Gideon* v. *Wainwright*, 372 U. S. 335. In that case the Court unanimously announced a clear and simple constitutional rule: In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer.[9]

The Court dealt with a sequel to *Gideon* in *Burgett* v. *Texas*, 389 U. S. 109. There a Texas indictment charging the petitioner with assault contained allegations of previous felony convictions, which, if proved, would have increased the punishment for assault under the state recidivist statutes. The indictment was read to the jury at the beginning of the trial. Records of two of the previous convictions were offered in evidence during the course of the trial, and it appeared that at least one of these convictions had been obtained in violation of *Gideon*. In reversing the Texas judgment, the Court said:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that . . . right." 389 U. S., at 115.

Earlier this Term we had before us a case in which it appeared that previous convictions obtained in viola-

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may nevertheless be used for the purpose of impeachment. Most reported state decisions, however, hold the contrary. See *Spaulding* v. *State*, 481 P. 2d 389 (Alaska 1971); *In re Dabney*, 71 Cal. 2d 1, 452 P. 2d 924 (1969); *Johnson* v. *State*, 9 Md. App. 166, 263 A. 2d 232 (1970); *White* v. *State*, 11 Md. App. 423, 274 A. 2d 671 (1971); *Subilosky* v. *Commonwealth*, — Mass. —, 265 N. E. 2d 80 (1970) (semble).

[9] This constitutional rule is wholly retroactive. *Pickelsimer* v. *Wainwright*, 375 U. S. 2; *Kitchens* v. *Smith*, 401 U. S. 847.

tion of *Gideon* had played a part in the determination of the length of a convicted defendant's prison sentence. *United States* v. *Tucker*, 404 U. S. 443. We there ruled that the Court of Appeals for the Ninth Circuit had been correct in holding that the teaching of *Burgett* required a remand of the case to the trial court for resentencing.

The *Tucker* case involved only that aspect of *Burgett* that prohibits the use of invalid prior convictions to "enhance punishment." The case now before us involves the use of such convictions "to support guilt." [10] For the issue of innocence or guilt in this case turned entirely on whether the jury would believe the testimony of an 8-year-old girl or that of Loper. And the sole purpose for which the prior convictions were permitted to be used was to destroy the credibility of Loper's testimony in the eyes of the jury.[11]

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[10] Under Texas law at the time, the jury, upon finding Loper guilty, was authorized in its absolute and unreviewable discretion to impose any punishment from five years in prison to death in the electric chair. Texas Pen. Code, Art. 1189 (1948). Thus, bringing the prior convictions to the attention of the jury may well also have served to enhance Loper's punishment.

[11] This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand. Cf. *Walker* v. *Follette*, 443 F. 2d 167, and see *Harris* v. *New York*, 401 U. S. 222; *Walder* v. *United States*, 347 U. S. 62. The previous convictions were used, rather, simply in an effort to convict Loper by blackening his character and thus damaging his general credibility in the eyes of the jury.

That a record of prior convictions may actually do more than simply impeach a defendant's credibility has been often noted. See, e. g., C. McCormick, Evidence § 43, p. 93 (1954):

"The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are for crimes similar to the one on

Unless *Burgett* is to be forsaken, the conclusion is inescapable that the use of convictions constitutionally invalid under *Gideon* v. *Wainwright* to impeach a defendant's credibility deprives him of due process of law.[12] We can put the matter no better than in the words of the Court of Appeals for the First Circuit:

> "We conclude that the *Burgett* rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,' for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt." *Gilday* v. *Scafati*, 428 F. 2d 1027, 1029.

A dissenting opinion filed today suggests that our decision presses the "sound doctrine of retroactivity beyond the outer limits of its logic." On the contrary, our decision in this case follows directly from the rationale under which *Gideon* v. *Wainwright*, *supra*, was given retroactive application. We have said that the principle

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trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility."

[12] In the circumstances of this case there is little room for a finding of harmless error, if, as appears on the record now before us, Loper was unrepresented by counsel and did not waive counsel at the time of the earlier convictions. Cf. *Subilosky* v. *Moore*, 443 F. 2d 334; *Tucker* v. *United States*, 431 F. 2d 1292; *Gilday* v. *Scafati*, 428 F. 2d 1027.

456-336 O - 72 - 15

established in *Gideon* goes to "the very integrity of the fact-finding process" in criminal trials, and that a conviction obtained after a trial in which the defendant was denied the assistance of a lawyer "lacked reliability." *Linkletter* v. *Walker*, 381 U. S. 618, 639 and n. 20. Loper has "suffered anew" from this unconstitutional deprivation, *Burgett* v. *Texas*, *supra*, regardless of whether the prior convictions were used to impeach him before or after the *Gideon* decision. It would surely be unreasonable, as the dissenting opinion suggests, to expect the judge at Loper's trial to have anticipated *Gideon*, just as it would have been unreasonable to have expected the judge at Gideon's trial to have foreseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges which were correct under the law prevailing at the time the judges made them."[11] If the retroactivity of *Gideon* is "sound," then this case cannot be decided under the ill-starred and discredited doctrine of *Betts* v. *Brady*, 316 U. S. 455.

The judgment before us is set aside, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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[11] The reasoning of the dissenting opinion would dictate that the rule in *Burgett* must not be given retroactive application, at least to cases where the sentence was imposed prior to *Gideon*. Yet by our disposition of *Bates* v. *Nelson*, 393 U. S. 16, where we vacated and remanded in light of *Burgett* a denial of habeas corpus following a 1957 conviction, we indicated that *Burgett* is retroactive in its application without regard to whether the use of the prior convictions was made prior to or after *Gideon*. Every federal court that has considered the question has held *Burgett* retroactive, and none has made the distinction suggested by the dissenting opinion. See, *e. g.*, *Walker* v. *Follette*, 443 F. 2d 167 (CA2 1971); *Lucious* v. *Sigler*, 406 F. 2d 795 (CA8 1969); *Tucker* v. *Craven*, 421 F. 2d 139 (CA9 1970); *Oswald* v. *Crouse*, 420 F. 2d 373 (CA10 1969).

MR. JUSTICE WHITE, concurring in the result.

The Court of Appeals affirmed the denial of Loper's petition for habeas corpus, reasoning that the use of invalid prior convictions to impeach a defendant in a criminal case does not raise an issue of constitutional proportions even though so using those convictions might well have influenced the outcome of the case. It was on that issue that we granted certiorari; and as our past cases now stand, I agree with MR. JUSTICE STEWART that the Court of Appeals' reasons for affirming the District Court were erroneous. This judgment, however, does not necessarily mean that Loper's conviction must be set aside. There remain issues, unresolved by the Court of Appeals, as to whether the challenged prior convictions were legally infirm: was Loper represented by counsel at the time of the earlier convictions; if not, did he waive counsel? These matters are best considered in the first instance by the Court of Appeals. The same is true with respect to the legal significance of the lack of proof with respect to the validity of one or more of the prior convictions used for impeachment purposes at Loper's trial. In this connection, I do not understand our prior decisions to hold that there is no room in cases such as this for a finding of harmless error; and if this case is ultimately to turn on whether there was harmless error or not, I would prefer to have the initial judgment of the lower court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

In 1942 this Court, in deciding *Betts* v. *Brady*, 316 U. S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction that had been entered against an indigent defendant whose request for appointed coun-

sel had been denied by the state trial court. *Betts* was overruled in 1963 by *Gideon* v. *Wainwright*, 372 U. S. 335. Loper's trial for rape was held five years after *Betts* and 16 years before *Gideon*. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an *evidentiary ruling* that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court. I dissent.

(1)

Three witnesses were called at Loper's 1947 trial. His eight-year-old stepdaughter testified that Loper raped her on August 9, 1947. A physician gave testimony corroborating that the child had been raped. Loper himself denied having committed the act, but admitted that there was a period of time during the day in question when he was at home alone with his stepdaughter and his four-month-old baby boy; he further admitted on cross-examination that his stepdaughter was, as far as he knew, a truthful child.

Under further cross-examination, Loper admitted to four prior burglary convictions entered against him in 1931, 1932, 1935, and 1940, respectively. At the 1969 habeas corpus proceeding here under review, Loper introduced court records relating to three of these burglary convictions and gave testimony relating to two of those three. The evidence presented to the District Court with respect to the four convictions may be summarized as follows:

(a) The court records for the 1931 conviction indicated only that Loper pleaded guilty upon being arraigned and that a six-month sentence was imposed nine days later. Loper testified before the District Court that he was not represented by an

attorney in connection with these 1931 proceedings; that he could not then have afforded private counsel; and that he never informed the trial court that he did not want to be represented by counsel.

(b) Loper introduced no court record and gave no testimony at all with respect to his 1932 conviction.

(c) Loper gave no testimony with respect to his 1935 conviction, but the court record of that conviction appears on its face to suggest that he was represented by counsel: "Came the Attorney General and the defendant in person, and this case was tried . . . before the Court and the . . . jury . . . [whose members,] having heard the proof, *arguments of Counsel* and the charge of the Court[,] on oath say defendant is guilty . . . ." (Emphasis added.)

(d) The court record of Loper's 1940 conviction recited that Loper appeared "in his own proper person." Loper testified before the District Court that he did not have counsel at his 1940 trial; that he did not "believe" he could then have afforded private counsel; and that he never informed the state court that he did not want to be represented by counsel.

Even if we, unlike the District Court,[1] treat as absolutely true everything to which Loper testified at the habeas corpus hearing, there is no basis on which we can conclude that he was not represented by counsel in the proceedings leading to his 1932 and 1935 convictions. With respect to the 1940 conviction, it surely cannot be said that Loper, through his testimony that he does

[1] The District Court, after observing Loper and hearing him testify, stated that "petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony . . . ."

not now "believe" that he then could have afforded private counsel, met his "burden of proving his inability at that time to hire an attorney." *Kitchens* v. *Smith*, 401 U. S. 847, 848 (1971). There is no basis, then, for a retroactive application of *Gideon* v. *Wainwright* to bring into question the validity of his 1940 burglary conviction.

If thus appears that of the four convictions introduced to impeach Loper's credibility at his 1947 rape trial, only the burglary conviction of 1931—a conviction entered upon Loper's plea of guilty—can reasonably be found on this record to have been even arguably invalid under *Gideon*.

(2)

When a defendant in a criminal trial elects to testify on his own behalf, he asks the jury, in effect, to believe his testimony rather than any conflicting testimony introduced by the prosecution. He presents himself to the jury as a person worthy of belief. In so doing, he brings into issue his credibility as a witness, and he thereby exposes himself to possible cross-examination designed to impeach that credibility. Such cross-examination is limited by state rules of evidence, of course, to matters which are relevant to credibility and which are not, at the same time, so prejudicial to the defendant that they must be excluded despite their relevance. Each State's rules governing such cross-examination reflect a balance that has been struck by that State in weighing, with respect to a given category of evidence, its probative value for impeachment purposes against the prejudicial effect it might have upon the jury's determination of the defendant's guilt or innocence of the crime charged.[2]

[2] Cf. *Michelson* v. *United States*, 335 U. S. 469 (1948), where this Court was called upon to strike a somewhat similar balance with respect to cross-examination designed to impeach the credibility of

The plurality opinion concludes that the Due Process Clause was violated if one or more of the prior convictions used to impeach Loper's credibility, even though fully valid under *Betts* v. *Brady*—the prevailing law when Loper was tried in 1947—was rendered constitutionally infirm by *Gideon*. The plurality opinion does not make clear, however, whether evidence of any such convictions is considered to be so lacking in probative value as to violate due process or to be so prejudicial as to do so. If its conclusion were grounded solely on a consideration of undue prejudice, the rationale underlying today's decision would be elusive indeed. There is no suggestion in the record that the jury might have failed to follow the instructions given by the trial judge that consideration of these prior convictions was to be restricted solely to the issue of Loper's credibility. Nor can any plausible contention be made that a jury has more difficulty following such instructions when it is dealing with an uncounseled conviction than when it is dealing with a counseled one.

It must be, then, that the conclusion of the plurality opinion is based upon the view that it is fundamentally unfair for a jury to be allowed to treat an uncounseled conviction, introduced to impeach a defendant, as though it had the probative value of a counseled conviction. Under this view, jurors who are told of a prior uncounseled conviction are misled in regard to a matter of *fact*;

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character witnesses who claim to be familiar with a defendant's reputation in the community. The Court held that when a defendant in a federal trial puts his character in evidence by calling such witnesses, the government may cross-examine those witnesses to determine whether they are aware of any prior arrests that may be on the defendant's record and that may consequently have affected his reputation. The Court reasoned that, despite the possibility of prejudice, "[t]o hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding *in reputation* when such might not be the fact . . . ." *Id.*, at 484 (emphasis added).

i. e., by being told merely that the defendant was in fact previously convicted of a felony, they are misled into believing that he was *duly* convicted when, under a retroactive application of *Gideon*, he in fact was not duly convicted. I cannot agree that such a view justifies a finding here that it was fundamentally unfair of the trial judge at Loper's 1947 rape trial to fail to make an evidentiary ruling, on his own motion, that he could have justified only by anticipating by 16 years this Court's overruling of *Betts* v. *Brady* in 1963. Not even the wisest member of this Court could have hazarded that prediction in 1947.

The plurality opinion, of course, does not analyze the case in these terms. It merely concludes, under a rigidly mechanistic approach, that since this Court held in *Gideon* that an uncounseled felony conviction calls for a new trial with counsel, we are compelled to strike down a fully counseled pre-*Gideon* conviction obtained through a trial in which evidence of one or more prior uncounseled convictions was collaterally used. This, of course, gives *Gideon* a collateral consequence of wholly unrealistic dimensions that are unrelated to basic fairness or due process; it is an effort to "unring the bell" on a series of burglary convictions dating back to a period 41 years ago. Parenthetically, I note that Loper nowhere denies that he committed these burglaries.

We all agree that the convictions used to impeach Loper's credibility during the 1947 trial were valid under the law prevailing at that time. The jury at Loper's 1947 trial cannot, therefore, be said to have been misled in regard to any contemporaneous matter of fact. Nor can it be said, without distorting the doctrine of retroactivity beyond all semblance of rationality and common sense, that the prosecutor or the presiding judge at Loper's rape trial acted in violation of the principle of "fundamental fairness." If Loper's trial was "funda-

mentally fair" when it was conducted, how can it be said to have undergone a metamorphosis because—16 years later and for another purpose—the law changed?

When we held that *Gideon* is retroactive, we meant that *Gideon* applies to an uncounseled felony conviction obtained in the past and renders *that conviction* invalid for all *future* purposes, *i. e.*, it renders unlawful the continuation into the future of the convicted prisoner's incarceration unless a new trial is had. *Gideon* does not, however, render such a conviction retroactively invalid for all purposes to which it may have already been put *in the past*. The Court, in giving such an enlarged effect to *Gideon*, plows new ground, disregarding the implications that will surely follow from the broadening of scope it now gives to the doctrine of retroactivity. For there must be many convictions that will be senselessly rendered vulnerable to attack by today's holding.

The Court applies the doctrine of retroactivity as though it required us to assess the fairness of past judicial proceedings without making any distinctions between a decision that was rendered *after* those proceedings and given retroactive effect, and a decision that was rendered *before* those proceedings; the Court thus seems to view the doctrine of retroactivity as requiring us to judge the fairness of Loper's 1947 rape trial as though that trial followed *Gideon*. Had the trial indeed followed *Gideon*, and had the trial judge permitted the prosecution to use prior uncounseled convictions to impeach Loper, then it might well be said that the judge denied fundamental fairness to Loper in refusing to follow the clear teaching of a decision of this Court and in thereby "erod[ing] the principle" of that decision. *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). We are, however, presented with no such situation here. The judge at Loper's trial did not refuse to follow any decision of this Court. Indeed, had he made the ruling

that the Court today implicitly holds he was required to make, he would have been very specifically refusing thereby to follow this Court's then-controlling decision in *Betts* v. *Brady*.

The plurality opinion states that "[i]f the retroactivity of *Gideon* is 'sound,' then this case cannot be decided under the ill-starred and discredited doctrine of *Betts* v. *Brady* . . . ." If we are precise, of course, this case is not to be "decided under" either *Betts* or *Gideon*, for it raises an entirely different question from that which the Court faced in those two cases. Both *Betts* and *Gideon* dealt with the *substantive* right to counsel in a state felony trial. The instant case deals with the collaterally related, but altogether different, question of the fundamental fairness of an implied *evidentiary ruling* made long before *Gideon*. The failure of the plurality opinion to recognize this simple, albeit crucial, distinction unfortunately prevents the drawing of a rational line that would preserve all the values of both *Gideon* and *Burgett* without at the same time producing the extravagant result reached by the Court today.

The introduction, in good faith and without objection, of lawfully admissible evidence, the truth of which is not presently subject to challenge, can hardly be called a violation of due process. Nor will such a violation arise retroactively by the occurrence of later events that may give grounds for challenging the truth of that evidence. Cf. *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963): "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." In 1947, Loper's prior burglary convictions, viewed as matters of evidentiary fact in the light of this Court's then-recent decision in *Betts* v. *Brady*, were valid convictions. Being valid in 1947, they were then admissible in evidence to impeach Loper's credibility. This Court's decision in *Gideon* 16 years

later may have rendered one or more of those convictions vulnerable to attack and not usable for *future* evidentiary or other purposes. Bearing in mind, however, that those burglary convictions were nothing but matters of evidentiary fact for the purposes of Loper's 1947 rape trial, any subsequently discovered invalidity in one of those burglary convictions no more rendered the conduct of Loper's rape trial fundamentally unfair than would the subsequent discovery of new evidence tending, for example, to discredit the testimony of a prosecution witness who was questioned in good faith by the State. The holding in *Gideon* that uncounseled convictions are constitutionally invalid properly leads us to require new trials to sustain any further confinement of persons previously convicted without counsel. But where prior uncounseled convictions were used in a pre-*Gideon* trial solely for *evidentiary* purposes to impeach the defendant, the logic of the rule enunciated in *Townsend* v. *Sain*, *supra*, counsels that we should treat *Gideon* for what it is *in this context*, *i. e.*, a decision whose effect on the prior impeaching convictions is properly analogized to the discovery of new evidence. Neither fundamental fairness nor any specific constitutional provision requires that a rule of evidence be made retroactive; consideration for the orderly administration of justice dictates the contrary.

Burgett v. *Texas*, *supra*, on which the plurality opinion relies, should not be read either to require or to justify today's decision. *Burgett* dealt with a post-*Gideon* trial and established that it is a violation of due process to introduce against a defendant evidence of a prior conviction *known at the time of its introduction* to be constitutionally infirm under *existing* law. In regard to Loper's case, the worst that can be said is that 16 years *after* his trial there was an event—the decision in *Gideon*—which, had it pre-dated rather than post-

dated the trial, would have affected an evidentiary ruling by the trial judge.

The rule implicit in the result reached by the Court today does violence both to common sense and to society's interest in the finality of judgments. Only if trial judges were soothsayers could they adhere to it. For under that rule, a prior conviction, admissible for impeachment purposes under state law and fully valid under the Constitution as explicitly interpreted by this Court at the time the conviction is sought to be introduced, becomes retroactively inadmissible if, years after the trial, a decision of this Court renders that prior conviction constitutionally infirm. With all respect, I submit that the United States Constitution does not give this Court the power to impose upon the States any such unmanageable and abstractly based rule as that. Indeed, such a rule is repugnant to the concept of federalism and to the very notions of reasonableness and orderliness embodied in the Due Process Clause. It is a distressing example of pressing the sound doctrine of retroactivity beyond the outer limits of its logic.

If *Burgett* does indeed mean what the plurality opinion reads into it, we should overrule that decision without delay. As Mr. Justice Harlan, for himself, Mr. Justice Black and MR. JUSTICE WHITE, observed, "We do not sit as a court of errors and appeals in state cases . . . ." 389 U. S., at 120.

MR. JUSTICE BLACKMUN, dissenting.

The plurality in this case applies *Burgett* v. *Texas*, 389 U. S. 109 (1967), and, seemingly, *United States* v. *Tucker*, 404 U. S. 443 (1972), to proscribe the use of allegedly uncounseled prior convictions of many years ago for the purpose of impeaching the defendant who takes the stand in his own defense. *Burgett* may be claimed to be a natural succeeding step to *Gideon* v. *Wainwright*, 372

U. S. 335 (1963), but its application to Loper's case has aspects, not particularly stressed by the plurality, that are troublesome for me:

1. The resolution of the original statutory rape case came down to a choice, on the part of the jury, between the testimony of the eight-year-old victim and the testimony of Loper. This, of course, is not uncommon in a rape case, but it always provides an element of unsureness. It is the woman's—or the child's—word against the man's. Hanging in the balance is a penalty of great severity. The 50-year sentence imposed on Loper is illustrative and is a tempting target for a reviewing court.

2. Obviously, the Court's familiar remand "for further proceedings consistent with this opinion" is really meaningless in this case. Certainly it does not carry with it the usual meaning and implications. The incident that is the subject of the criminal charge took place 25 years ago. The victim, then eight years old, is now about 33. I suspect that an event which would be vivid at the time for a child has faded, mercifully, in the victim's memory. Retrial, if not impossible, is highly unlikely. The Court's remand therefore actually translates into an enforced state acquittal and release for Loper.

3. The plurality's reliance upon Loper's testimony at the habeas hearings and upon certified records of Mississippi and Tennessee proceedings is not complete. Perhaps the records of the 1931 and 1940 proceedings could be said to support an implication that Loper was not represented by counsel in those cases. But no record at all of the 1932 Mississippi proceeding was presented. And the 1935 recital that Loper appeared "in person" is no more than the customary recital, if properly drawn, for any criminal proceeding when counsel is, in fact, present. As the plurality's footnote 3 reveals, Loper testified as to the absence of counsel at only the 1931 and 1940 proceedings. He said nothing with respect to the 1932 and 1935 proceed-

ings. Thus, for me, the 1932 and 1935 prior convictions stand effectively unchallenged on this record. Surely, as to them, Loper has not sustained his burden of proof.

4. I have more than a mild suspicion that as a practical matter the outcome of the case would have been exactly the same had the priors not been used to impeach Loper's credibility. Yet their use was legally accepted 25 years ago. That use, now held improper by the Court, destroys the conviction irretrievably.

5. Loper's troubles with the law did not cease with his statutory rape conviction in 1947. As the opinion of the Court of Appeals reveals, 440 F. 2d 934, 936, Loper was on parole in 1963 when he was arrested for car theft in Mississippi. While a parole revocation order was awaiting execution, he escaped and was a fugitive for more than a year.

6. I see no need to recede from *Burgett* v. *Texas* at this time, but its application to the circumstances of Loper's case gives me the impression that what appears to be an acceptable principle can be run into the ground when indiscriminately applied. Here again, by impractical application, the plurality has painted itself into a corner. Here again, some realism is needed. See *United States* v. *Tucker*, 404 U. S., at 452 (BLACKMUN, J., dissenting).

We were advised at oral argument that Loper once more is on parole and is working in Texas.* Thus, assuming he behaves himself or, to put it more formally, that he does not violate his parole, the plurality's decision, however it were to go, would not have much effect upon his present freedom. On balance, I feel that THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, in dissent, have the better of the argument, and certainly the stronger position in the light of the practicalities. I therefore also dissent.

*Tr. of Oral Arg. 27, 31–32.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

In reversing the judgment of the Court of Appeals which affirmed denial of federal habeas corpus relief to petitioner, the plurality undertakes to apply the constitutional doctrine of *Burgett* v. *Texas*, 389 U. S. 109 (1967), and *United States* v. *Tucker*, 404 U. S. 443 (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the plurality must conclude that the prior burglary convictions obtained many years ago in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified with respect to the Mississippi convictions at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

> "At the outset it might be stated that petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony. . . ." (App. 61.)

On the basis of other factual inconsistencies that were resolved against the petitioner, the trial judge made the following general observation concerning petitioner's credibility:

> "As stated at the outset, petitioner has filed innumerable applications for relief. Pound for pound,

> he is probably the most prolific writer of writs to come before this Court. His applications, verified under oath, and his testimony in open court under oath, have been found repeatedly to be completely false." (App. 65.)

It is therefore surprising, at least at first blush, to find the plurality reaching the constitutional question that it decides. I believe the procedural posture in which this case is presented calls for more attention than it receives in the plurality's opinion.

In 1947, petitioner was convicted in a Texas state court of the crime of statutory rape upon his eight-year-old stepdaughter. In the course of that trial, petitioner took the stand, and, as appropriate under Texas law, was cross-examined about four prior convictions for burglary which had been obtained against him in the States of Mississippi and Tennessee during the period from 1931 to 1940. The jury convicted petitioner of the offense, and sentenced him to serve 50 years in the penitentiary. That conviction has long since become final, and indeed petitioner is now on parole.

In the present habeas proceeding, petitioner sought to attack not only the 25-year-old Texas judgment of conviction under which he still serves, but also to challenge the constitutional validity of the Mississippi and Tennessee burglary convictions which vary in age from 30 to 40 years. He introduced certified copies of a 1940 Mississippi conviction, reciting appearances at the trial by the prosecutor and by "the defendant in his own proper person"; a certified copy of the indictment and judgment in a 1935 Tennessee burglary conviction reciting appearances by the prosecutor "and the defendant in person"; and a certified copy of an indictment, judgment, and sentence obtained in Mississippi in 1931 which were silent regarding the presence or absence of counsel. No documentary evidence whatever was introduced with re-

spect to the 1932 Mississippi burglary conviction, which was the fourth such judgment about which he was interrogated in the course of the Texas rape trial.

In addition to such documentary evidence, petitioner in the federal habeas proceeding took the stand himself and testified explicitly that he had not been advised of his right to counsel, nor had he been furnished counsel in the 1931 and 1940 Mississippi burglary convictions. But the testimony of the petitioner in this proceeding was found by the federal habeas judge to be false. (*Supra*, at 498.)

In *Johnson* v. *Zerbst*, 304 U. S. 458, 468–469 (1938), one of the landmark habeas corpus decisions of this Court, Justice Black said:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ."

In addition to the very substantial interests in "a visible end to the litigable aspect of the criminal process . . . ,"[1] this case presents other unique practical con-

[1] *Mackey* v. *United States*, 401 U. S. 667, 690 (1971) (separate opinion of Harlan, J.).

siderations for placing the traditional *Johnson* burden upon the petitioner to establish a substantial constitutional deprivation. In this case, unlike the normal habeas proceeding, not only the underlying state conviction is put in question, but also convictions of another era from other States.

It is a sufficiently difficult task for a federal district court sitting in Texas to review a Texas state criminal proceeding for constitutional error; in that case the Texas state custodian himself is a defendant in the proceeding, all counsel and the district judge are familiar with local Texas criminal procedure, and the State and petitioner both have available such witnesses as may be necessary to augment the record pertaining to the judgment under attack. Whatever evidentiary hearing is held will take place in the general locale where those witnesses who have knowledge of the earlier state proceedings are available to testify.

It is a good deal more difficult for the same Texas habeas court to make a second-level collateral review of judgments of conviction rendered in the state courts of Mississippi and Tennessee. The States that rendered the convictions are not parties to the Texas habeas proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served. Neither the Texas District Court nor Texas counsel can be expected to have any familiarity with the vagaries of criminal procedure in Mississippi and Tennessee. If there are any surviving witnesses to the actual court proceedings, which took place from 30 to 40 years ago, they are sufficiently distant from the location of the Texas habeas court as to render their voluntary appearance unlikely, and their compulsion by process impossible.

In *Carnley* v. *Cochran*, 369 U. S. 506 (1962), a case that came here on certiorari to review a judgment of the

Supreme Court of Florida, this Court held that, in the face of a record completely silent on the issue, there was a presumption against waiver of a fundamental constitutional right such as the right to counsel.[2] One need not quarrel with this principle, applied as it was in *Carnley* to the review of a state supreme court refusal to vacate a recent judgment of one of its lower courts, to believe that in the circumstances presented by the instant case the burden of proof prescribed for federal habeas actions in *Johnson* v. *Zerbst*, *supra*, should remain on the habeas petitioner. This is consistent with the holding last Term in *Kitchens* v. *Smith*, 401 U. S. 847, 848 (1971), in which a petitioner asserted in a state habeas proceeding that his Sixth Amendment rights under *Gideon* v. *Wainwright* had been violated because the State had failed to provide him with counsel in a 1944 proceeding at which time he alleged he was indigent. In reversing the denial of habeas relief, the Court said: "Of course, to establish his right to appointed counsel in 1944, petitioner had the burden of proving his inability at that time to hire an attorney."

Under *Gideon* v. *Wainwright*, the petitioner in the case before us was entitled to the assistance of counsel in each of the Mississippi and Tennessee burglary trials in which he was a defendant. However, even under *Gideon*, the assignment of counsel to every criminal defendant is not mandatory; the defendant may, upon being advised of his right, determine that he does not wish to avail himself of it. Thus, the fact that the transcript of the judgment roll admitted from the Tennessee and Mississippi proceedings indicates in at least two of the four cases that petitioner did not have counsel

[2] Carnley was convicted and sentenced on September 19, 1958. On June 16, 1960, the Supreme Court of Florida granted a provisional writ of habeas corpus that was discharged on September 23, 1960. *Carnley* v. *Cochran*, 123 So. 2d 249, 250 (1960).

is not conclusive on the issue of whether his rights under *Gideon* v. *Wainwright* were violated. Under *Johnson* v. *Zerbst*, the burden in federal habeas corpus is upon him to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel. Here petitioner explicitly testified in a manner that, if the trial judge had chosen to believe him, would indeed have established that he did not waive his right to counsel in the Mississippi proceedings and thus those convictions were obtained in violation of *Gideon* v. *Wainwright*. However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of the cases, both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of an interested witness. *NLRB* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659 (1949). As I read the memorandum opinion of the District Judge, that is precisely what he chose to do here.

It is true that our grant of certiorari in this case was limited to the question that is decided by the plurality in today's opinion. But the limited nature of the grant is not an advance guarantee that after reading briefs and hearing oral argument, we will be satisfied that the question is properly presented to us. Our duty to avoid constitutional adjudication when narrower grounds of decision are possible is clearly established by such holdings of the Court as that in *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring), and *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549 (1947).

Concluding as I do that the necessary predicate for the plurality's constitutional decision is absent, I would dismiss the writ of certiorari as improvidently granted. Since the plurality addresses itself to the merits of the case, I do likewise. I would affirm the judgment of

the Court of Appeals on the ground that petitioner has not satisfactorily met his burden of proof that the Mississippi and Tennessee convictions were obtained in violation of *Gideon* v. *Wainwright*, and therefore that court was correct in affirming the District Court's judgment denying habeas relief.